SUPREME COURT, U. S.

FILED

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IN THE

SUPREME COURT OF THE

UNITED STATES

October Term 1968

No. 325

THE PENNWICK CORPORATION,
a California corporation,

Appellant,

vs.

EDWARD J. KIRBY, DIRECTOR OF THE DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL OF THE STATE OF CALIFORNIA,

Appellee.

Appeal from the Decision of the Court of Appeal of the State of California, Second Appellate District, Division Two, 2nd Civil No. 31240 and of the California Supreme Court

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JURISDICTIONAL STATEMENT

JACQUES LESLIE
LAWRENCE TEPLIN
9255 Sunset Blvd.
Suite 920
Los Angeles, Calif.

Attorneys for Appellant

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Suite 920
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Attorneys for Appellant

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Appeal from the Decision of the Court of Appeal of the State of California, Second Appellate District, Division Two, 2nd Civil No. 31240 and of the California Supreme Court

JURISDICTIONAL STATEMENT

PRIOR PROCEEDINGS

This is an appeal by a retail liquor licensee

from the decision of the California Court of Appeal, Second Appellate District, Division Two, rendered May 10, 1968, which was unreported. The decision of the Court of Appeal, entitled Reimel v. House (appended hereto as Appendix A) reversed the decision of the Honorable Ralph Nutter, Judge of the Superior Court of Los Angeles County, which decision denied a Writ of Mandate directed to the Alcoholic Beverage Control Appeals Board of the State of California. Said Appeals Board had held in favor of Appellant in an unreported case appended hereto as Appendix "B".

GROUNDS ON WHICH JURISDICTION OF THE SUPREME COURT IS INVOKED.

The proceedings in the State Court arise out of administrative proceedings before the Department of Alcoholic Beverage Control of the State of California for a violation of §24755 Business and Professions Code of the State of California, the California Mandatory Retail price fixing law. The Department ordered the license suspended for sales of liquor below mandatory retail prices which had been filed by liquor distillers with the State of California.

Appellant duly appealed to the Alcoholic Beverage Control Appeals Board, a State body set up by the California Constitution to review decisions of the Department. Said Appeals Board reversed the decision of the Department on State grounds, although the Federal grounds

had also been raised. Such decision was filed on November 2, 1965.

The Department then petitioned the Superior Court of Los Angeles County for a Writ of Mandate directing the Appeals Board to annul its decision.

The Superior Court denied the Petition for a Writ of Mandate and the Department appealed to the Court of Appeals. The Appeals Board was the named respondent and The Pennwick Corporation was the named Real Party in Interest. The Court of Appeals reversed the decision of the Superior Court on May 10, 1968. Pennwick petitioned for a hearing to the California Supreme Court which Petition was denied on July 3, 1968 without opinion.

This is an appeal pursuant to 28 U.S.C.A. 1257(2). Among the cases believed to sustain jurisdiction are Seagram & Sons v. Hostetter, 384 U.S. 35 and Standard Oil Company of California v. Johnson, 316 U.S. 481.

The California Statutes and laws which appellant claims to be in violation of the United States Constitution and the Federal Anti-Trust laws are California Business and Professions Code, §24755, a copy of which is appended hereto as Appendix "C" and Title 4, California Administrative Code, Rule 99, appended hereto as Appendix "D".

QUESTIONS PRESENTED BY THIS APPEAL

The questions presented by this appeal are as follows:

1. Whether or not the California Liquor Price Fixing Laws (§24755 of the Business and Professions Code) are invalid as being in violation of the Anti-Trust Laws of the United States (15 U.S.C.A. §§ 1, 2 and 45), because they do not come within the exceptions provided in the Miller-Tydings or McGuire Acts and because prices are fixed for goods that are not in fair and open competition.

2. Whether or not §24755 Business and Professions Code and Title 4, Rule 99, California Administrative Code are violative of the Due Process Clause of the Fifth Amendment and the Due Process and the Equal Protection Clauses of the Fourteenth Amendment of the United States Constitution because:

(a) The statute sets up privilege for liquor manufacturers and wholesalers whereby the State of California at public expense enforces the fixed price. Such enforcement is not provided for any other industry.

(b) Two different trading areas are set up within the State. No valid reason or legitimate purpose exists for either of the foregoing discriminatory practices.

(c) A state function is delegated to private industry without adequate, or indeed, any safeguards.

(d) Economically disadvantaged persons are required to purchase inferior goods and are prevented from taking advantage of quantity discounts. The statute, if effective, only enforces prohibition for the poor and not the wealthy.

FACTS MATERIAL TO THE CONSIDERATION OF THE QUESTIONS PRESENTED

Appellant holds a license to sell alcoholic beverages. This license was suspended after an administrative hearing by the Department of Alcoholic Beverage Control for sales of alcoholic beverages below a minimum price filed by the wholesalers and manufacturers of the alcoholic beverages in violation of §24755 Business and Professions Code.

The federal questions were raised at all stages of the proceedings; initially, in the notice of defense filed at the administrative level. The notice of defense is appended hereto as Appendix "E". The federal questions are raised on pages E-5 to E-8, inclusive.

In the Notice of Appeal before the Appeals Board the federal questions were also raised (see Appendix "B", p. B-2).

The issues were not reached by the Appeals Board (Appendix B-6). The federal questions are raised in the answer to Petition for Writ of Mandate, appended hereto as Appendix "F" at pages F-12 to F-13.

The federal issues are also set forth in the briefs filed with the Court of Appeals at pages 17 to 21, inclusive and in the Petition for Hearing in the California Supreme Court. Said brief and petition are filed concurrently herewith as part of the certified record in this case.

In essence, the attitude of the California Courts has been that the constitutional issues have been settled in California by virtue of the cases of Wilke and Holzheiser v. Department of Alcoholic Beverage Control, 65 Cal. 2d 385 and Reimel v. Alcoholic Beverage Control Appeals Board, 256 A.C.A. 188 (now before this Court as Cohen v. Kirby, Oct. Term 1967).

By virtue of §24755 Business and Professions Code, a manufacturer of alcoholic beverages need only file a minimum price schedule for such beverages with the State of California and publish it in a trade journal. Thereafter, the State of California, at no expense whatsoever to the manufacturer enforces his minimum price by gathering evidence and prosecuting the violators. There is no state control of the price to be set. Only the manufacturer sets the price.

The rules of the Department allow a 10% discount on the minimum price for case purchases. There is also a substantial number of

sales in California of non-brand name alcoholic beverages for which no minimum price is filed. These non-branded liquors are substantially cheaper than the branded items and are usually inferior in quality.

A SUBSTANTIAL FEDERAL QUESTION IS INVOLVED IN THE PROPOSED APPEAL

Petitioner alleges that §24755 of the California Business and Professions Code violates the Constitution of the United States in that it is violative of the Due Process Clause of the Fifth Amendment and the Equal Protection Clause and the Due Process Clause of the Fourteenth Amendment of the United States Constitution, and further alleges that it is in conflict with the Sherman Anti-Trust Act (15 U.S.C.A., §§ 1, 2 and 45).

This State statute has been before the California Supreme Court twice in the last eight years, Allied Properties v. Department of Alcoholic Beverage Control, 53 Cal. 2d 141, 346 P. 2d 737, and Wilke & Holzheiser v. Department of Alcoholic Beverage Control, 65 Cal. 2d 349, 420 P. 2d 735.

The statute in question is California's mandatory price fixing statute for alcoholic beverages. Under the statute, manufacturers merely file and publish the price at which their brands are to be sold. No state agency controls the price and the manufacturer is free to set any

price he chooses for his product. Thereafter, the Department of Alcoholic Beverage Control enforces the price at no cost to the manufacturer and licensees are subject to suspension and/or revocation of their license for sales below the filed price.

The statute was first held to be constitutional in the Allied Properties case, supra, in 1959, by a four to three decision. In 1966, the California Supreme Court again consented to hear a case deciding the constitutionality of the statute, and in the Wilke and Holzheiser case, supra by a five to two decision, again held the statute to be constitutional.

It should be emphasized that §24755 is not a civil fair trade statute providing a civil remedy to persons aggrieved by sales below a fair trade price. It is a State administered statute providing for action by the State to enforce the manufacturer's prices through the offices of the Department of Alcoholic Beverage Control.

The Allied Properties case, supra, was not appealed to this Court. In the Wilke and Holzheiser case, supra, an application was made to a three Judge District Court which held that plaintiff's remedy was solely by way of appeal or petition for certiorari to the United States Supreme Court, 266 F. Supp. 168.

These are the first cases involving a ruling on the constitutionality of the liquor price fixing statute of California where application has been made to this Court.

There is a sharp division of authority among the highest courts of other states as to the constitutionality of liquor price fixing statutes similar to California's statute.

The Louisiana Supreme Court in holding a mandatory liquor price fixing statute, that was similar to California's unconstitutional, stated that the statute:

> "'. . . bears no real or substantial relation to the general health, morals or welfare of the people. At best, it represents an ignoble flight from competition."

Reynolds v. Louisiana, Board of Alcoholic Beverage Control, 185 So. 2d 794, 812 (La. 1966) (Petition for Certiorari to U. S. Supreme Court denied, U.S. Law Week 3173, November 14, 1966).

The Supreme Court of New Mexico held in Drink, Inc. v. Babcock, 421 P. 2d 798, that the New Mexico statute,

> ". . . [was] not an appropriate exercise of the States' police power . . . ."

421 P. 2d at 803.

Perhaps the most succinct analysis of the true purpose of these liquor fair trade laws is contained in the decision of the Florida Supreme Court, holding such a law unconstitutional,

wherein the court stated:

> "The act, upon its face, is one not designed to affect the public health, safety or welfare, but is designed solely for the protection of the wholesale liquor dealer by allowing him to control the retail prices so that his customers may be forced to sell liquor at a substantial prifit. . . ."
>
> Scarborough v. Webbs Cutrate Drug Company, 150 Fla. 754, 8 So. 2d 913, 922 (1942).

Similar liquor price fixing statutes have been held unconstitutional in Oklahoma in Oliver v. Oklahoma Alcoholic Beverage Control Board, 359 P. 2d 183 (1966); in Kansas in State v. Mermes, 358 P. 2d 936 (1961); in Illinois in Lombardo Wine Co. v. Taylor, 95 N. E. 2d 60; and in Nebraska in Terry Carpenter v. Nebraska Liquor Control Commission, 120 N. W. 2d 374.

In the Allied Properties case, supra, the dissenting judge in the California Court of Appeals pointed out in connection with the statute that:

> ". . . the very person or corporation that manufactures or distributes the product sets the price at which the retailer may and must sell, without any right of any kind or character on the part of any representative of the State, to challenge it for price, quality

or otherwise. This, to me, is uncontrolled monopoly run riot with State sanction."

339 P. 2d at 1024.

Mr. Justice Peters of the California Supreme Court, who dissented in the Allied Properties case, supra, also stated in his dissent in the Wilke and Holzheiser case that:

". . . the fair trade provisions of the Alcoholic Beverage Control Act, together with the disciplinary power given the Department of Alcoholic Beverage Control directly by the Constitution, comprises a mandatory price fixing system whereby the producers or wholesalers of branded or trade-marked alcoholic beverages fix the retail prices of those beverages, and adherence to the prices is guaranteed by threat of imposition by the State of Civil and Criminal sanctions upon non-complying retailers."

55 Cal. Rptr. at 44.

He then concluded that:

"It is apparent from an analysis of the liquor fair trade law, however, that it bears no relation at all to the purported objective of promoting temperance. While the stated purpose of the law is to restrict the sale

and consumption of alcoholic beverages the use of fair trade contracts as a means necessarily guarantees that that objective will not be achieved." (Emphasis added.)

55 Cal. Rptr. at 47.

The California price fixing statute violates the Equal Protection Clause of the Fourteenth Amendment of the United States Constitution because it is enforced by the State of California for the benefit of liquor manufacturers and against liquor retailers while no other manufacturers of any other goods have this privilege and no other retailer of goods are subject to this discipline and enforcement, and, because, with no basis for the distinction, two different trading areas are set up within the State and the manufacturer can file one price for Northern California and another price for Southern California. The taxpayers of California thus support a non-governmental special segment of the economy.

Furthermore, the effect of mandatory price fixing is to make drinking of branded liquors economically impossible only for low income groups who are required to purchase non-branded alcoholic beverages which are sold at substantially reduced prices. California statutes also allow a ten per cent (10%) discount on brand items for case purchases. Thus, the wealthy not only are the only ones who can afford the branded fair traded items, but if they have sufficient purchasing power, they may avail themselves of a ten per cent (10%) discount not avail-

able to low income groups unable to purchase case lots. In effect, the system requires the poor to purchase alcoholic beverages of inferior quality and denies them the discount available.

Finally, the statute, if the purpose is to promote temperance by fixing high prices, in effect, fosters prohibition only for the economically disadvantaged and not for the poor in violation of the Equal Protection Clause of the Fourteenth Amendment.

Section 24755 of the California Business and Professions Code which sets up the price fixing statute, is a statute which is clearly written by and for the liquor distillers and on its face presently violates Federal anti-trust laws. Prior to 1961, the statute provided that branded alcoholic beverages in fair and open competition could be fair traded in California upon a price established by a contract or agreement. This was in line with the express provisions of the exemptions provided by the Miller-Tydings (15 U. S. C. A. §1) and McGuire (15 U. S. C. A. §45) acts.

The amendment in 1961 of Section 24755 (in response to a finding by a Superior Court that a revocation was improper because there had been no finding that the items were in fair and open competition as required by the statute and the exemption amendments to the Sherman Act §1) eliminated the necessity of a contract or agreement and eliminated the requirement that the commodity be in fair and open competition.

The elimination of these requirements is clearly not in accord with the anti-trust immunity provided for by the Miller-Tydings and the McGuire Acts and minimum price fixing by agreement or compulsion is illegal per se under the Federal anti-trust laws unless the Federal exemption statutes apply. (See: United States v. McKesson & Robbins, 351 U.S. 305, 309-311 [1953] and Schwegmann Bros. v. Calvert Distillers Corp., 341 U.S. 384, 386-388 [1950]. It can be noted that the latter case concerned contracts for price fixing of liquor and it was still struck down by the United States Supreme Court.)

Since the California statute does not provide for either "fair and open competition" or for contracts, it is not immunized from Federal anti-trust laws. Eastman Kodak v. Federal Trade Commission (2nd Cir.), 330 U.S. 828, clearly hold that the Miller-Tydings amendment only validates retail price agreements with respect to pricing of commodities which are in effective competition with similar commodities produced by others.

Evidence of "lack of fair and open competition" has not been permitted before California administrative agencies or courts. See: DeMartini v. Department of Alcoholic Beverage Control, 215 Cal. App. 2d 787 and Dave's Market v. Department of Alcoholic Beverage Control, 222 Cal. App. 2d 671.

The California Attorney General, representing the Department of Alcoholic Beverage Control, has argued in the Wilke and Holzheiser and

Allied Properties cases, supra, that the Twenty-first Amendment to the United States Constitution prevents any challenge of the California statute. It has since been established by the United States Supreme Court, however, that no such rule exists, e. g., in Hostetter v. Idlewild Bon Voyage Liquor Corp., 377 U. S. 324, 12 L. Ed. 2d 350, 84 S. Ct. 1293, where the court states at 12 L. Ed. 2d, at page 356, that:

> "To draw a conclusion from this line of decisions that the Twenty-first Amendment has somehow operated to repeal the commerce clause wherever regulation of intoxicating liquors are concerned, would be an absurd over simplification."

The Supreme Court in 1966 held, in Joseph E. Seagram, Inc. v. Hostetter, 86 S. Ct. 1254, that the Twenty-first Amendment must be read in light of the other amendments of the Constitution, and although the court upheld the New York law being questioned there, it clearly established the principle that the State law had to be a reasonable law and not deny the requirements of Equal Protection of the laws as provided by the Fourteenth Amendment.

The facts found by the "Moreland Commission on the Alcoholic Beverage Control law" appointed by Governor Rockefeller regarding the background and ineffectiveness of mandatory price fixing laws also demonstrate the evils of such laws. It was The Moreland report which caused New York to change its mandatory price

fixing statute (which previously was like California's statute) and to pass the present New York statute held constitutional in Seagram & Sons v. Hostetter, 384 U.S. 35, 16 L. Ed. 2d 336, 86 S. Ct. 1254. The Moreland Commission found, at page 1 of the report, that,

> "The mandatory price control should be eliminated because (1) New York consumers are compelled to pay unnecessarily high prices for packaged liquor, (2) competition is stifled and economical waste encouraged."

The statute further constitutes special legislation by the State of California for the benefit of manufacturers and wholesalers of alcoholic beverages.

The statute bears no reasonable relationship to the exercise of the police power of the State or the alleged object sought to be obtained, i. e., the promotion of temperance, indeed, the statute is designed to achieve the opposite effect.

The statute by granting state enforced price fixing powers to private persons also "is an unlawful delegation of legislative authority and is so arbitrary as to amount to a denial of due process" (dissenting opinion, Wilke and Holzheiser, supra, 55 Cal. Rptr. at p. 49).

The Supreme Court is the only court available now to rule on the constitutionality of the California statute. In Dave's Market v. Department of Alcoholic Beverage Control,

(U.S. Dist. Ct. for No. Dist. of California, So. Div., No. 41103), a three judge District Court was convened but sent the matter back for determination on State issues. When the case was returned to the Federal Court, the determination was made that Federal issues must necessarily have been determined along with the State issues and therefore appeal to the Supreme Court was the only remedy. This was also essentially the decision in the District Court case of Wilke & Holzheiser v. Department of Alcoholic Beverage Control, 266 F. Supp. 168.

CONCLUSION

Legalized price fixing and monopoly should be subject to careful scrutiny by the courts to insure strict compliance with the federal exceptions. When a statute allows a manufacturer to set an arbitrary price at which his commodity must be sold throughout the state and then when the state enforces this price at no expense to the manufacturer the consumer is harmed. Not only is the consumer forced to pay the higher price he is also required, by way of taxes for the state enforcement, to pay the cost of enforcing the higher prices.

Such a state sanctioned monopoly and gratuity to liquor manufacturers should not be tolerated. A full briefing of the matter should be allowed by this Court for the protection of the consumers of the State of California and other consumers in states having similar laws.

Respectfully submitted,

JACQUES LESLIE

LAWRENCE TEPLIN

Attorneys for Appellant

APPENDIX "A"

IN THE COURT OF APPEAL
OF THE STATE OF CALIFORNIA
SECOND APPELLATE DISTRICT
DIVISION TWO

JAMES O. REIMEL, Director of the Department of Alcoholic Beverage Control of the State of California, Petitioner and Appellant, vs. LEVERETTE D. HOUSE, LEON M. COOPER, ROGER P. GARETY, as Chairman and Members of the Alcoholic Beverage Control Appeals Board, Defendants and Respondents.	2nd CIVIL NO. 31240 Court of Appeal Second Dist. FILED May 10 1968 Clay Robbins, Jr. Clerk

APPEAL from a judgment of the Superior Court of Los Angeles County. Ralph H. Nutter, Judge. Reversed, with directions.

Thomas C. Lynch, Attorney General, and Lynn Henry Johnson, Deputy Attorney General, for Appellant.

Leslie & Rubin and Lawrence Teplin for Real Party in Interest, Pennwick Corporation.

Leo K. Gallant, Senior Counsel, Alcoholic Beverage Control Appeals Board, for Respondent Alcoholic Beverage Control Appeals Board.

The instant appeal arises in the same manner and involves the identical issues recently decided in Reimel v. Alcoholic Bev. etc. Appeals Bd., 256 A. C. A. 188 (hearing denied January 17, 1968).

Here, as in the case above cited, the trial court denied the petition for writ of mandate sought by the appellant, Department of Alcoholic Beverage Control, and thereby upheld the action of the respondent, Alcoholic Beverage Control Appeals Board, in reversing the decision of the Department wherein a penalty had been imposed upon respondent and real party in interest, Pennwick Corporation, for selling certain alcoholic beverages at prices less than the established fair trade price in violation of Business and Professions Code, section 24755, and Title 4, California Administrative Code, section 99(a). The trial court spelled out the basis for its decision in the following conclusion of law:

"The decision of respondent [Alcoholic Beverage Control Appeals Board] that the record must contain substantial evidence of publication of the price schedules in compliance with the provisions of section 24755 of the Business and

Professions Code constitutes a correct interpretation of that code section. Publication of the price schedules in a trade journal circulated among some but not all licensees in the trading area is not such compliance, and the department's rule 99(k) (title 4, California Administrative Code, section 99, subparagraph (k) is invalid and in conflict with the publication provisions of Business and Professions Code section 24755, subparagraph (b)." Subparagraph (b) of section 24755, insofar as here pertinent, reads as follows:

"Any person filing such [minimum retail price] schedule shall cause such schedule to be published in a manner which will result in each retailer affected by such schedule being advised of the contents of such schedule prior to the effective date thereof." The Department's rule 99(k) interpreting the above quoted language provides:

"(k) Publication. The person filing minimum retail price schedules shall cause prices for all items on every original price schedule and for every change of price or new price on every replacement price schedule to be published in a trade journal of general circulation in the trading areas affected on or before the effective date thereof."

The minimum prices for the alcoholic beverages in issue in the instant proceeding had been published in the August 1964 edition of Patterson's Gazetteer. Patterson's Gazetteer is a trade publication directed to the alcoholic

beverage industry. It is published monthly and includes the prices of alcoholic beverages at wholesale and retail. It is published in the eight counties that compose the "trading area of Southern California" (Bus. & Prof. Code, § 24755(b)), and there are no similar publications published in these counties. Its subscribers are liquor licensees, wholesalers and brand owners and it has a circulation of approximately 10, 500 subscribers. Although not necessary to the narrow question here presented, appellant introduced evidence that Pennwick was mailed the issues of Patterson's Gazetteer for June, July, August and September, 1964.

As previously indicated, the court in Reimel v. Alcoholic Bev. etc. Appeals Bd., supra, 256 A.C.A. 188, 195-201, rejected the contention of the respondent Appeals Board that section 24755(b) required that publication occur in such a manner that each retailer will necessarily be advised of the contents of the applicable minimum price schedule. It held that the Department had correctly interpreted section 24755(b) in its rule 99(k) and that the publication required need only be in a manner most likely to give notice to the affected licensees. A trade journal in general circulation in the trading area was held to be a proper vehicle for such publication. We concur in this determination. The more recent decision in Reimel v. House, 259 A.C.A. 532, is in accord.

Although not the basis of the decision here under review, respondent Pennwick urges that section 24755 is unconstitutional and that section

24755.1 relating to penalties and added by the Legislature in 1965 is retroactive in application. Each of these contentions was expressly rejected in Wilke & Holzheiser, Inc. v. Dept. of Alcoholic Bev. Control, 65 Cal.2d 349, 355 et seq. and 369 et seq., and in Reimel v. Alcoholic Bev. etc. Appeals Bd., supra, 256 A.C.A. 188, 201-204 and 205-206.

Respondent Pennwick in its brief has urged several additional points which were not raised before the Department, the Appeals Board or the superior court. "[T]hese points relate to questions of fact or mixed questions of fact and law which could have been presented to and considered by the Department. Under well-established rules such matters may not be urged for the first time on appeal. [Citations.]" (Reimel, supra, p. 205.)

The judgment is reversed. The superior court is directed to grant a writ of mandate commanding the respondent Appeals Board to set aside its decision reversing the decision of the Department and to affirm such decision of the Department.

HERNDON, J.

We concur:

ROTH, P.J.

FLEMING, J.

THE COURT: This opinion is not for publication pursuant to the provisions of Rule 976, California Rules of Court.

APPENDIX "B"

SERVED
on all parties by
certified mail
Date Nov 2 1965

BEFORE THE ALCOHOLIC BEVERAGE CONTROL APPEALS BOARD OF THE STATE OF CALIFORNIA

In the Matter of the Accusation against THE PENNWICK CORPORATION 8347 Beverly Boulevard Los Angeles Respondent and Licensee under the Alcoholic Beverage Control Act.	AB-2441 File No. 17710; Reg. No. 4672 Time & Place of Hearing: August 26, 1965, @10 a.m. 1525 South Broadway, Los Angeles, California For Department: Honorable Thomas Lynch Attorney General John M. Huntington, Deputy Attorney General

For Appellant:
Daniel Schiffer, Esq.
(No appearance at oral argument.)

Submitted on the record.

In a decision adopted by the department on May 20, 1965, it was determined that appellant The Pennwick Corporation had violated section

24755, Business and Professions Code and related department rule 99(a), title IV, California Administrative Code (fair trade provisions). A penalty of suspension of the license for a period of 15 days was imposed.

Appellant's appeal is taken upon the grounds:

"1. The Department has proceeded without jurisdiction;

"2. The Department has proceeded in excess of its jurisdiction;

"3. The Department has not proceeded in the manner required by law;

"4. The Department's Decision is not supported by the Findings;

"5. The Findings are not supported by substantial evidence in the light of the whole record;

"6. The statutes, rules and regulations sought to be enforced by the Department against Respondent are unconstitutional in the respects urged in Respondent's Notice of Defense filed with the Department and incorporated herein by reference, and in the Hearing before the Office of Administrative Procedure."

The department's accusation charging a violation of the minimum retail price provisions

was served on or about October 19, 1964, and alleged that appellant violated or permitted the violation of sections 24752 and 24755 of the Business and Professions Code and rule 99, title IV, California Administrative Code.

Appellant filed a notice of defense under sections 11505 and 11506 of the Government Code and asserted 17 affirmative defenses to the department's accusation. The hearing officer overruled the objections set forth in the notice of defense and held the affirmative defenses to be without merit. In its decision, the department determined that appellant violated section 24755, Business and Professions Code and rule 99(a), title IV, California Administrative Code.

The department's decision contains the following:

"FINDINGS OF FACT:

"COUNT I

"It is true that on August 25, 1965 respondent, then being licensed under the above designated retail off-sale general license at the above designated premises, did at said premises by one of its clerks, sell to Donald Yawman alcoholic beverages at retail in sizes, quantities, and at prices more particularly set forth below, while during the month of August, 1964, the effective minimum retail price for said alcoholic beverages was $19.57 plus sales tax.

"Quantity	Sizes	Brand Names
2	Quarts	Ancient Age Kentucky Straight Bourbon, 6 years old, 86 proof
1	4/5 qt.	Lang's Lightest Scotch 8 years old

Sales Prices	Posted Price per Bottle	Total Minimum Price
	$ 6.29	$12.58
	6.99	6.99
$17.20 including tax		$19.57 .78 tax $20.35

"RULING ON SPECIAL DEFENSES

"The objections set forth in the Notice of Defense filed by respondent

are overruled and the affirmative defenses set forth in said document are found to be without merit.

"FINDINGS AS TO PREVIOUS RECORD: Licenses since April 27, 1962. No prior disciplinary action.

"DETERMINATION OF ISSUES PRESENTED:

"Respondent violated Section 24755 of the Alcoholic Beverage Control Act and Rule 99(a), Title IV, California Administrative Code, as charged. Grounds for the suspension or revocation of its license under Section 24200(b) of said Act were established.

"PENALTY: The license is suspended for 15 days."

The facts relating to the purchase of alcoholic beverages at prices below the minimum prices provided for in the distilled spirits minimum retail price schedules are not in dispute. The testimony of Donald Yawman and Daniel A. LaTendresse, together with exhibits introduced, constitutes substantial evidence as to the fact of sale.

In argument appellant has raised a number of questions pertaining to the minimum price provisions of the Alcoholic Beverage Control Act. These questions pertain mainly to the constitutionality of this legislation. Some

argument has also been directed to claimed error inasmuch as the hearing officer did not afford appellants an opportunity to refute any officially noticed matters as provided for by section 11515 of the Government Code. Appellant also contends that the department did not prove compliance with the statutory requirement concerning publication, citing appeals board decisions AB-2089, Cohon and Sirbu; AB-2185, Carella and Maniscalco; and AB-2258, Dorian and Matoff.

We do not here reach the constitutional question because of the failure of the record to contain substantial evidence to support the department's findings. We find no error with respect to the hearing officer taking official notice of appellant's prior record. Argument on this point becomes somewhat academic inasmuch as the department found that appellant's licensed premises had been "Licensed since April 27, 1962. No prior disciplinary action." Appellant's objection, which may be classified as technical, was properly overruled. Appellant does not contend that the department's finding as to the previous record is incorrect.

In our opinion, the department's decision must be reversed because the record does not contain substantial evidence of publication of the price schedules as required by section 24755 of the Business and Professions Code. (See Appeal of Cohon and Sirbu, AB-2089; Appeal of Carella and Maniscalco, AB-2185; and Appeal of Dorian and Matoff, AB-2258.) The record in the instant matter, based upon the testimony of Owen A.

Sloan, managing editor of "Patterson's California Beverage Gazetteer," establishes that a copy of the trade publication for the period involved in the department's accusation was mailed to appellant. A copy of the August 1964 publication was introduced into evidence (department's exhibit 3, R. T. 14). In our opinion, appellant had notice of the price schedules involved. Although the record was not developed as to the question of circulation of the publication, it is apparent that any licensee who did not pay for a subscription to the publication did not receive the publication. (R. T. 24.) In AB-2185, Carella and Maniscalco, the same question was presented, and we there said:

> " . . . Section 24755(b) requires the filing of a minimum retail price schedule with the department and publication of said price schedule 'in a manner which will result in each retailer affected by such schedule being advised of the contents of such schedule.' (Emphasis added.) Subsection (e) of section 24755 provides:
>
> > " 'No offsale licensee shall shall sell any package of distilled spirits at any price less than the effective filed price of such package unless written permission is granted by the department, for good cause shown and for reasons not inconsistent with this division.'

"It is our interpretation of these sections that in order for there to be an 'effective filed price' for the beverage involved, the record must show compliance with the mandatory provisions of section 24755(b) as to filing with the department and publication in the manner prescribed. The offense is not that of selling below the minimum filed price, but rather, of selling, in the language of the statute itself, below the 'effective filed price.' (Emphasis added.) And to be 'effective', the price must be not only filed but also published as required by law. If all that was required was the simple filing of the price schedule with the department, there would have been no need for the Legislature to require publication in the manner indicated and to also insert the adjective 'effective' in subsection (e). Obviously the two provisions are related and must be read together. Such interpretation gives meaning to the express language employed by the Legislature.

"Section 24755 is clear in its requirement that publication '. . . shall . . . be . . . in a manner which will result in each retailer affected . . . being advised . . .' Since to be 'effective' the schedule must be published in accordance with the provisions of this section,

the record must contain substantial evidence of compliance therewith. In our opinion, the record in this case does not establish publication as required by the statute, and so the evidence does not support the department's finding that appellants sold at a price below the minimum retail price schedule duly filed."

In view of the foregoing, the decision of the Department of Alcoholic Beverage Control in the present proceeding is hereby reversed.

LEVERETTE D. HOUSE,
CHAIRMAN
ALCOHOLIC BEVERAGE
CONTROL APPEALS
BOARD

We Concur:
Leon M. Cooper
Roger P. Garety

Sacramento, California
October 28, 1965

APPENDIX "C"

CALIFORNIA BUSINESS AND PROFESSIONS CODE

§24755. Minimum retail price schedule; filing; amendments; loss leader sales; rejection of noncomplying schedules; exempt sales. (a) No package of distilled spirits which bears the brand, trademark or name of the owner or person in control shall be sold at retail in this State for consumption off the license premises unless a minimum retail price for such package first shall have been filed with the department in accordance with the provisions of this section.

(b) A price for each of such packages shall be in a minimum retail price schedule setting forth with respect to each package the exact brand, trademark or name, capacity, and type of package, type of distilled spirits, age and proof, where stated on the label, and the minimum selling price at retail. The price for any such package may be filed separately and differently for the trading area of Southern California and the trading area of Northern California. The trading area of Southern California shall consist of the Counties of Santa Barbara, Ventura, Los Angeles, Orange, Riverside, San Bernardino, Imperial and San Diego. The Northern California trading area shall consist of the other counties of the State. No more than one person shall file a schedule for the same package for the same trading area. Any person filing such schedule shall cause such schedule to be published in a manner which will result in each retailer

affected by such schedule being advised of the contents of such schedule prior to the effective date thereof.

(c) Such schedule shall be filed by (1) the owner of the brand, if licensed in the State; (2) any licensee, other than a retailer, selling the brand and who is authorized in writing by the brand owner to file such schedule if the brand owner is not licensed in this State; (3) a manufacturer or rectifier licensed in this State and who bottles under the brand owned by a retailer; or (4) any licensee with the approval of the department, if the owner of the brand does not file or is unable to file a schedule or authorize a licensee other than a retailer to file such schedule.

(d) Schedules filed pursuant to this section may be amended, changed, or modified by filing such amendments, change, or modification with the department on or before the 15th day of any month to take effect on the first day of the second succeeding calendar month; except that prices filed for a brand, size, or type not included in a schedule in effect at the time such brand, size, or type is filed, and prices filed to meet the price of a competitive brand, may be filed on or before the 15th day of any month to take effect on the first day of the following month. For the purpose of this section, a competitive brand shall mean any brand of the same type of distilled spirits having a filed selling price at retail within one dollar ($1) per gallon of the brand for which a competitive price is filed.

No retailer shall sell any package of distilled spirits as a loss leader. "Loss leader," as used in this section, means a sale below cost as such cost is defined in Sections 17026 to 17029, inclusive, of this code, except that a sale below cost made under the provisions of Section 17050 of this code shall not be deemed a loss leader sale.

The department shall reject any price schedule which does not comply with this subdivision.

(e) No offsale licensee shall sell any package of distilled spirits at any price less than the effective filed price of such package unless written permission is granted by the department, for good cause shown and for reasons not inconsistent with this division.

(f) The provisions of this section shall not apply to:

(1) A closeout sale made in good faith and approved by the department when the following conditions exist: (i) the stock of distilled spirits sought to be closed out has been in this State, either in the possession of the vendor who sold it to the retailer or in the possession of the retailer who seeks to close out the brand, for a period of not less than six months; (ii) the stock of distilled spirits to be closed out was not brought into this State for the purpose of offering it, or any part of it, at a closeout sale; (iii) at least 10 days prior to filing a request with the department for approval to sell the

stock at a closeout sale, the retailer had offered to return the distilled spirits, at his original invoice cost, to both the vendors from whom he purchased them or to his successor and to the licensee who filed the minimum price schedule under the provisions of this section; (iv) such offer of return was not accepted.

At the place of any closeout sale and upon any package of distilled spirits to be so sold and in any advertisement in connection therewith, public notice shall be given of the sale as a closeout sale. Following the conclusion of a closeout sale, the retailer who conducted such sale shall not sell the same brands of distilled spirits for a period of at least one year.

(2) Sales made with the approval of the department when the distilled spirits or the package is damaged or deteriorated in quality and notice of this fact is given to the public at the place of any such sale and upon the package offered for sale and in any advertisement in connection therewith.

(3) Sales made by any officer acting under the orders of any court.

(g) A minimum retail price schedule containing a minimum retail price for each package of any brand of beer may be filed under the provisions of this chapter by the person in control of such brand and when so filed, the provisions of this chapter and any rules adopted by the department for the administration of the

provisions of this chapter shall apply to the sale of packages of such brand of beer. (Added Stats. 1961, c. 635, p. 1835, § 4.)

APPENDIX "D"

99. Minimum Retail Price Schedules. (a) Posting of Minimum Retail Price Required. No off-sale licensee shall sell any package of distilled spirits at a price less than the effective minimum retail price of such package filed with the department, unless written permission is granted by the department for good cause shown and for reasons not inconsistent with the law.

The licensed owner or person in control of a brand, trade mark or name appearing on a package of distilled spirits which is to be sold for consumption off the licensed premises in California must file a "Distilled Spirits Minimum Retail Price Schedule" containing the minimum bottle and case prices to consumers for every distilled spirits item carrying that brand, trade mark or name.

(b) Brand Defined: The word "brand" as used herein means "brand, trade mark, label or name", and if an additional secondary name or a different form of label is used, each will be considered to be a separate brand.

(c) Distilled Spirits Item Defined. "Distilled spirits item" as used herein means a distilled spirits package that differs from all other distilled spirits in addition to its brand, as defined in (b) above, in any one of the following categories: (1) Type of distilled spirits including type of bottling (in bond or not in bond),

and type of blend (blend of straight whiskeys or spirits blend); (2) Percentage of Straight Whiskey; (3) Age, if shown on the label; (4) Proof; (5) Origin (domestic or imported); (6) Bottle size; and (7) Number of bottles in a case.

When a container other than the normal container for a brand is used as in the case of a decanter, higher minimum retail prices must be established to reflect any additional cost involved.

(d) Distilled Spirits Sold "On-Sale" Only. If a particular item is labeled to indicate that it is intended for sale to and for dispensing by on-sale retailers only (such as "bar package", "for on-sale only"), the minimum retail price thereof need not be filed. However, if any sale for off-sale consumption of such item should be made, the licensee making such sale will have violated the law.

(e) Who Files Minimum Retail Price Schedules. Only one licensee is permitted to file a "minimum retail price schedule" containing the price for the same item for the same trading area. However, different prices may be filed in the Northern and Southern trading areas.

This means that (1) the owner of the brand or the corporate subsidiary who exclusively markets the products thereof and so is the controller of the brand, if licensed in California, if other than a retailer, must file; or (2) if the

owner of the brand is not licensed in California and has no corporate subsidiary marketing in California, any licensee, other than a retailer, authorized by him in writing must file, such as a wholesaler or importer authorized by an out-of-State or out-of-country brand owner; or (3) if the brand is owned by a retailer, the California-licensed manufacturer or rectifier who bottles an item of distilled spirits under that brand must file for the item; or (4) if none of the three situations above apply and the brand is owned by a retailer, the importing wholesaler must file. If none of the three situations above apply and the brand is not owned by a retailer, then any licensee, other than a retailer, who secures the approval of the department must file.

(f) Price Schedule Sheets to be Filed. Four copies of a "Distilled Spirits Minimum Retail Price Schedule" on a form prescribed by the department must be filed with the department, 1215 O Street, P. O. Box 1139, Sacramento 5, and one copy retained by the licensee in his office for inspection. The "Minimum Retail Price Schedule" may be printed, typewritten or otherwise duplicated on 16 or 20 pound paper on a format and size prescribed by the department and must show the form number "ABC 705" in the lower left-hand corner of the face of the sheet. All information called for on the form sheet must be supplied. A separate set of "Price Schedules" must be made originally, or if added later as a new item, for every different type of distilled spirits, and if that type has different categories as defined in (2), (3), (4)

and (5) in the definition of "Distilled Spirits Item" in (c) above, a separate set must be made for each such difference. Each schedule must contain every bottle size (6) and every size of case (7) in which that brand, type, etc., will be sold. When a new bottle size or new size case is to be sold, or the price of any size of bottle or size of case already on file is to be changed either independently or to meet the price of a competitive brand, new sets of price schedules, in quadruplicate, must be filed to replace those on file and must also include all the information that was on the superseded schedule. Both minimum retail bottle price and minimum retail case prices covering all case sizes must be shown on the price schedules for each size and type.

(g) Filing Dates; New Item. A set of original schedules for new items must be filed on or before the close of business of the fifteenth day of any calendar month to take effect on the first day of the following month, provided, however, the price of such new item is published on or before the aforesaid effective date.

(h) Change of Minimum Retail Price on File. A set of replacement schedules must be filed on or before the close of business of the fifteenth day of any calendar month, to be effective on the first day of the second succeeding month; provided, however, the changed price is published on or before the aforesaid effective date.

(i) Change in Price of an Item to Meet

Price of Competitive Brand. A set of replacement schedules for competitive items must be filed on or before the close of business of the fifteenth day of any calendar month, to be effective on the first day of the following month, provided, however, such price change is published on or before the aforesaid effective date.

A competitive brand is a brand of the same type of distilled spirits as the brand for which a change in price is being filed and for which at the time of filing there is on file a "Price Schedule" sheet filed by some other licensee showing a minimum retail price for the competitive brand item within one dollar per gallon of the price being charged, and proportionately for smaller sizes. The same type of distilled spirits means one identical as to categories (1) and (5) in the definition of "Distilled Spirits Item" in (c) above; the price change involved must apply to the identical item indicated in categories (6) and (7).

If a price is filed to meet the price of a competitive brand, the price so filed shall be the same as the price which is being met.

(j) Filing Date Exception. Whenever the fifteenth day of any month falls on Saturday, Sunday or a legal holiday, the price schedules required to be filed may be filed not later than the close of business the next business day.

(k) Publication. The person filing minimum retail price schedules shall cause prices for all items on every original price schedule

and of every change of price or new price on every replacement price schedule to be published in a trade journal of general circulation in the trading areas affected on or before the effective date thereof. Publication of minimum retail prices for a brand sold only to a single retailer may be accomplished by the mailing of such price schedules by the importer, manufacturer, manufacturer's agent, rectifier or wholesaler, and any amendments thereto, to the retail licensee affected thereby. The schedule shall be deposited in the United States Post Office on or before the date or dates required for publication of price schedules as prescribed above in this paragraph, and the mailing shall be complete at the time of such deposit. A record of each such notification should be retained in the file of the posting licensee for three years.

(l) Deliveries. No manufacturer, wholesaler or rectifier shall make deliveries of any particular item of distilled spirits to any off-sale retail licensee before a "Price Schedule" with that item thereon has been filed with the department; thereafter he may make deliveries thereof within such time before the price becomes effective as would give the retailer reasonable time to get the item ready for sale upon the price becoming effective.

(m) Withdrawal of Item from Price Schedule. No item may be deleted from a replacement "Price Schedule" once it has been filed on an original schedule until the department authorizes such deletion when the department makes a

finding that the item is carried in wholesale and off-sale retail inventories in only very small quantities.

(n) Transfer of Price Filing Obligation. When, for any reason, price filing responsibility for any item is transferred from one licensee to another, the price schedules of the licensee then on file will continue in effect until replaced by an effective new filing by the successor which will be considered to be a schedule already on file.

(o) Tax Increase or Government Order. Pursuant to an order issued by the department, any price schedule may be changed at any time to reflect changes in federal or state excise taxes on distilled spirits or to comply with the requirements of any order issued by the federal government and relating to price control.

(p) Sales as Loss Leaders Prohibited. All distilled spirits minimum retail prices filed under the provisions of Section 24755 shall comply with all the provisions of said section including the provisions of subsection (d) which prohibits the sale of distilled spirits as a loss leader. Any licensee filing distilled spirits minimum retail prices below the purchasing retailer's cost of acquisition plus said retailer's cost of doing business as referred to in said subsection shall produce evidence to show that such price was filed to meet the legal price of a competitor selling the same article or product.

NOTE: Authority cited for amendment filed 10-2-56: Sections 24757 and 25750, Business and Professions Code; Section 22, Article XX, California Constitution. Issuing agency: Department of Alcoholic Beverage Control. Additional authority cited: Sections 24749, 24750, 24751, 24752 and 25752, Business and Professions Code.

History: 1. Repealer and new section filed 9-12-61; designated effective 10-15-61 (Register 61, No. 18). For prior history, see Register 60, No. 16.

APPENDIX "E"

LAW OFFICES OF JACQUES LESLIE
By DANIEL A. SCHIFFER
9255 Sunset Boulevard, Suite 920
Los Angeles, California 90069
Telephone: CR 5-4424 BR 2-3212

Attorneys for Respondent

BEFORE THE DEPARTMENT OF
ALCOHOLIC BEVERAGE CONTROL
OF THE STATE OF CALIFORNIA
P. O. BOX 1139
SACRAMENTO 95805

In the Matter of the Accusation Against	) FILE 17710) REG. 4672
THE PENNWICK CORPORATION - 8347 Beverly Boulevard Los Angeles, California 90048.	) NOTICE OF DEFENSE UNDER SECTION 11505 OF THE GOVERNMENT CODE.
OFF-SALE GENERAL LICENSE Respondent.	)
License under the Alcoholic Beverage Control Act.	) REQUEST FOR HEARING

TO: THE DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL:

The undersigned Respondent, named in the above entitled proceeding, hereby acknowledges receipt of a copy of the Accusation and the statement that a hearing may be requested in said

proceeding by filing a Notice of Defense as provided in Section 11506 of the Government Code within fifteen (15) days after the service upon the undersigned of said Accusation. A hearing is hereby requested in said proceeding to offer defense to the charges contained in said Accusation.

Attached hereto is Respondent's NOTICE OF DEFENSE as provided in Section 11506, Government Code.

DATED:
October 31, 1964.

RESPONDENT:
THE PENNWICK CORPORATION
LAW OFFICES OF JACQUES LESLIE

By: Daniel A. Schiffer
Daniel A. Schiffer
Attorneys for Respondent
9255 Sunset Boulevard
Los Angeles, California
90069

APPENDIX "E"

LAW OFFICES OF JACQUES LESLIE
9255 Sunset Boulevard, Suite 920
Los Angeles, California 90069
TELEPHONE: CR 5-4424 BR 2-3212

Attorneys for Respondent

BEFORE THE DEPARTMENT OF
ALCOHOLIC BEVERAGE CONTROL
OF THE STATE OF CALIFORNIA

P. O. BOX 1139

SACRAMENTO 95805

In the Matter of the Accusation Against	) FILE 17710) REG. 4672
THE PENNWICK CORPORATION - 8347 Beverly Boulevard Los Angeles, California 90048	) NOTICE OF DEFENSE UNDER SECTION 11506 OF THE GOVERNMENT CODE.
OFF-SALE GENERAL LICENSE Respondent.	
License under the Alcoholic Beverage Control Act.	

I. OBJECTIONS

Respondent objects to the above entitled and numbered Accusation and to each and every allegation in the single count thereof, upon the following grounds:

1. Respondent objects thereto upon the ground that the same does not state acts or omissions upon which the agency may proceed.

2. Respondent objects to the form of the Accusation on the ground that it is so indefinite that Respondent cannot identify each transaction or prepare its defenses thereto.

3. Respondent objects to the form of the Accusation on the ground that it is so uncertain that Respondent cannot identify each transaction or prepare its defenses thereto.

II. AFFIRMATIVE DEFENSES

Respondent, by way of Affirmative Defenses, alleges:

1. that the said proceeding herein violates its rights under the California Constitution and the Constitution of the United States, and, more particularly, with respect to its right to equal protection under the laws of said jurisdictions and its right to due process as guaranteed by each of said Constitutions in that the hearing provided for herein is sham and affords no substance of lawful protection to Respondent.

2. that the Alcoholic Beverage Control Act and the rules and regulations adopted pursuant thereto governing Fair Trade, as they are sought to be applied against Respondent, are violative of Respondent's rights under the Constitutions of the United States and of California in that they create arbitrary, unreasonable and preferential legislative and administrative provisions which constitute special legislation for the use and benefit of the alcoholic beverage vendors to the retailers thereof.

3. that the Alcoholic Beverage Control Act and the rules and regulations adopted pursuant thereto, as they are sought to be applied against Respondent, unlawfully delegate legislative power and thereby are null and void.

4. that the Alcoholic Beverage Control Act and the rules and regulations adopted pursuant thereto, as they are sought to be applied

against Respondent, are violative of Article XX, Sec. 22 of the California Constitution.

5. that the Alcoholic Beverage Control Act and the rule and regulations adopted pursuant thereto, as they are sought to be applied against Respondent, constitute an unlawful, improper and excessive exercise of the police powers of this State, in the following respects:

(a) Neither said Act nor the rules and regulations adopted pursuant thereto, as they are sought to be applied against Respondent, (1) is protective of the safety, welfare, health, peace and morals of the people of this State; (2) eliminates the evils of unlicensed and unlawful sale and disposition of alcoholic beverages; (3) promotes temperance in the use and consumption of alcoholic beverages.

(b) Said rules and regulations violate the Legislative intent as expressed in Sec. 23049 of said Act.

(c) The grounds for disciplinary action asserted by the Department exceed the authority conferred by Article XX, Sec. 22, California Constitution, and Sec. 24200 (a) and (b), Alcoholic Beverage Control Act.

(d) Each of the sections of said Act governing fair trade contracts and price posting, in all respects in which the same are sought to be applied against Respondent, are invalid, unlawful and void in that they constitute:

(1) An unlawful exercise of police powers.

(2) The denial to Respondent of fundamental due process as required by the Constitutions of the United States and of California.

(3) Such arbitrary, capricious, unreasonable and discriminatory classification and regulation of Respondent as a retailer as to prevent the public from deriving the benefits of price and services competition among retailers while at the same time arbitrarily, capriciously, unreasonably and discriminatorily omitting comparable classification and regulation of suppliers to retailers of alcoholic beverage products as contemplated by Article XX, Sec. 22, California Constitution and legislation enacted in implementation thereof.

(4) An unlawful delegation to private, non-governmental persons and entities of the power to perform governmental duties enjoined upon the state by Article XX, Sec. 22, of the California Constitution.

(5) An unlawful appropriation and expenditure of public funds principally for the use and benefit of private, non-governmental persons and entities for non-public purposes, in violation of the Constitution of this state.

(6) An arbitrary, capricious, unreasonable and discriminatory division of the state into trading areas in violation of Sec. 23049 of the said Act.

6. the Accusation and the single count therein, and each and every allegation in said count thereof;

(a) fails to allege facts sufficient to constitute a violation by Respondent of any public law.

(b) fails to allege reasonable or probable cause for the filing of the Accusation against Respondent.

DATED: October 31, 1964.

Respondent: THE PENNWICK CORPORATION

LAW OFFICES OF JACQUES LESLIE

By Daniel A. Schiffer
Daniel A. Schiffer
Attorneys for Respondent
9255 Sunset Boulevard
Los Angeles, California 90069

APPENDIX "F"

LAW OFFICES OF JACQUES LESLIE
9255 Sunset Boulevard - Suite 920
Los Angeles, California 90069

Telephone: CR 5 4424
BR 2 3212

Original Filed
Dec 21 1965

Attorneys for Real Party In Interest

SUPERIOR COURT OF THE STATE
OF CALIFORNIA FOR THE COUNTY
OF LOS ANGELES

JAMES O. REIMEL, DIRECTOR OF THE DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL OF THE STATE OF CALIFORNIA, Petitioner, vs. ALCOHOLIC BEVERAGE CONTROL APPEALS BOARD OF THE STATE OF CALIFORNIA, Respondent.	NO. 873 353 REG. NO. 4672 ANSWER TO PETITION FOR WRIT OF MANDATE

Real Party In Interest, PENNWICK CORPORATION (herein referred to as "Pennwick"), in answer to the Petition, admits, denies and alleges:

Answering Paragraph IV, admits the allegations therein except denies that said administrative proceedings were duly held; denies that PENNWICK CORPORATION violated Business and Professions Code Section 24755, and Title 4, California Administrative Code Section 99 (a); and alleges that at all times material neither Business and Professions Code Section 24755 nor Section 99 (a) imposed any duty upon Pennwick; that Section 24752 vested no jurisdiction in Petitioner to impose any discipline upon Pennwick; that Section 24752, Business and Professions Code, reads as follows:

> "24752. Selling below fair trade price. Wilfully and knowingly advertising, offering for sale, or selling any alcoholic beverage at less than the price stipulated in any contract entered into pursuant to this chapter, whether the person so sdvertising, offering for sale, or selling is or is not a party to the contract, is unfair competition and is actionable at the suit of any person damaged thereby.";

that Section 23008, Business and Professions Code, reads as follows:

> "23008. 'Person.' 'Person' includes any individual, firm, co-partnership, joint adventure, association, corporation, estate, trust, business trust, receiver, syndicate, or any other group or combination acting as a unit, and the plural as well

as the singular number.";

that Section 24757, Business and Professions Code reads as follows:

> "24757. Rules. The department may adopt such rules as it determines to be necessary for the administration of Sections 24754 to 24756, inclusive.";

that Sections 24749 through 24757, Business and Professions Code, entitled, "Chapter 10, Alcoholic Beverages Fair Trade Contracts and Price Posting," were enacted or amended by the Legislature at the same session thereof (Stats. 1961. Chapter 635) and must be read and construed together; that none of said sections confers any jurisdiction upon Petitioner to discipline Pennwick; that the reference to Section 24755 in Section 24752, Business and Professions Code, specified the only remedy for an alleged violation of said Section 24752 and Section 24755; that Section 24755 pertains only to sales by vendors (specified in Section 24756) to retailers of alcoholic beverages, and confers upon the Petitioner herein no jurisdiction to impose any discipline upon Pennwick.

That Section 99, Title 4, California Administrative Code, reads as follows:

> "99. Minimum Retail Price Schedules. (a) Posting of Minimum Retail Price Required. No off-sale licensee shall sell any package of distilled spirits at a price less than the effective minimum

retail price of such package filed with the department, unless written permission is granted by the department for good cause shown and for reasons not inconsistent with the law.

"The licensed owner or person in control of a brand, trade mark or name appearing on a package of distilled spirits which is to be sold for consumption off the licensed premises in California must file a 'Distilled Spirits Minimum Retail Price Schedule' containing the minimum bottle and case prices to consumers for every distilled spirits item carrying that brand, trade mark or name.

"(b) Brand Defined. The word 'brand' as used herein means 'brand, trade mark, label or name,' and if an additional secondary name, or a different form of label is used each will be considered to be a separate brand.

"(c) Distilled Spirits Item Defined. 'Distilled spirits item' as used herein means a distilled spirits package that differs from all other distilled spirits in addition to its brand, as defined in (b) above, in any one of the following categories:

(1) Type of distilled spirits including type of bottling (in bond or not in bond), any type of blend (blend of straight whiskeys or spirits blend);

(2) Percentage of Straight Whiskey;
(3) Age, if shown on the label;
(4) Proof; (5) Origin (domestic or imported); (6) Bottle size; and
(7) Number of bottles in a case.

"Where a container other than the normal container for a brand is used as in the case of a decanter, higher minimum retail prices must be established to reflect any additional cost involved if it has utilitarian value other than as a container. Such additional cost must not be less than the actual cost, as defined in Section 17026 of the Unfair Practices Act.

"Where a single container constitutes a case, the minimum retail bottle and case price must be the same.

"(d) Distilled Spirits Sold 'On-Sale' Only. If a particular item is labeled to indicate that it is intended for sale to and for dispensing by on-sale retailers only (such as 'bar package,' 'for on-sale only'), the minimum retail price thereof need not be filed. However, if any sale for off-sale consumption of such item should be made, the licensee making such sale will have violated the law.

"(e) Who Files Minimum Retail Price Schedules. Only one licensee is permitted to file a "minimum retail price schedule" containing the price for the same item for the same trading area. However, different

prices may be filed in the Northern and Southern trading areas.

"This means that (1) the owner of the brand or the corporate subsidiary who exclusively markets the products thereof and so is the controller of the brand, if licensed in California, if other than a retailer, must file; or (2) if the owner of the brand is not licensed in California and has no corporate subsidiary marketing in California, any licensee, other than a retailer, authorized by him in writing must file, such as a wholesaler or importer authorized by an out-of-State or out-of-country brand owner; or (3) if the brand is owned by a retailer, the California-licensed manufacturer or rectifier who bottles an item of distilled spirits under that brand must file for the item; or (4) if none of the three situations above apply and the brand is owned by a retailer, the importing wholesaler must file. If none of the three situations above apply and the brand is not owned by a retailer, then any licensee, other than a retailer, who secures the approval of the department must file.

"(f) Price Schedule Sheets to be Filed. Four copies of a 'Distilled Spirits Minimum Retail Price Schedule' on a form prescribed by the department must be filed with the department, 1215 O Street, P. O. Box 1139, Sacramento 5, and one copy retained by the licensee in his office

for inspection. The 'Minimum Retail Price Schedule' may be printed, typewritten or otherwise duplicated on 16 or 20 pound paper on a format and size prescribed by the department and must show the form number 'ABC 705' in the lower left-hand corner of the face of the sheet. All information called for on the form sheet must be supplied. A separate set of 'Price Schedules' must be made originally, or if added later as a new item, for every different type of distilled spirits, and if that type has different categories as defined in (2), (3), (4) and (5) in the definition of 'Distilled Spirits Item' in (c) above, a separate set must be made for each such difference. Each schedule must contain every bottle size (6) and every size of case (7) in which that brand, type, etc., will be sold. When a new bottle size or new size case is to be sold, or the price of any size of bottle or size of case already on file is to be changed either independently or to meet the price of a competitive brand, new sets of price schedules, in quadruplicate, must be filed to replace those on file and must also include all the information that was on the superseded schedule. Both minimum retail bottle price and minimum retail case prices covering all case sizes must be shown on the price schedules for each size and type.

"(g) Filing Dates; New Items. A set of original schedules for new items must be

filed on or before the close of business of the fifteenth day of any calendar month to take effect on the first day of the following month; provided, however, the price of such new item is published on or before the aforesaid effective date.

"(h) Change of Minimum Retail Price on File. A set of replacement schedules must be filed on or before the close of business of the fifteenth day of any calendar month, to be effective on the first day of the second succeeding month; provided, however, the changed price is published on or before the aforesaid effective date.

"(i) Change in Price of the Item to Meet Price of Competitive Brand. A set of replacement schedules for competitive items must be filed on or before the close of business of the fifteenth day of any calendar month, to be effective on the first day of the following month; provided, however, such price change is published on or before the aforesaid effective date.

"A competitive brand is a brand of the same type of distilled spirits as the brand for which a change in price is being filed and for which at the time of filing there is on file a 'Price Schedule' sheet filed by some other licensee showing a minimum retail price for the competitive brand item within one dollar per gallon of the price being charged, and proportionately for smaller sizes. The same type of distilled spirits

means one identical as to categories (1) and (5) in the definition of 'Distilled Spirits Item' in (c) above; the price change involved must apply to the identical item indicated in categories (6) and (7).

"If a price is filed to meet the price of a competitive brand, the price so filed shall be the same as the price which is being met.

"(j) Filing Date Exception. Whenever the fifteenth day of any month falls on Saturday, Sunday or a legal holiday, the price schedules required to be filed may be filed not later than the close of business of the next business day.

"(k) Publication. The person filing minimum retail price schedules shall cause prices for all items on every original price schedule and for every change of price or new price on every replacement price schedule to be published in a trade journal of general circulation in the trading areas affected on or before the effective date thereof. Publication of minimum retail prices for a brand sold only to a single retailer may be accomplished by the mailing of such price schedules by the importer, manufacturer, manufacturer's agent, rectifier or wholesaler, and any amendments thereto, to the retail licensee affected thereby. The schedule shall be deposited in the United States Post Office on or before the date or dates required

for publication of price schedules as prescribed above in this paragraph, and the mailing shall be complete at the time of such deposit. A record of each such notification should be retained in the file of the posting licensee for three years.

"(l) Deliveries. No manufacturer, wholesaler or rectifier shall make deliveries of any particular item of distilled spirits to any off-sale retail licensee before a 'Price Schedule' with that item thereon has been filed with the department; thereafter he may make deliveries thereof within such time before the price becomes effective as would give the retailer reasonable time to get the item ready for sale upon the price becoming effective.

"(m) Withdrawal of Item from Price Schedule. No item may be deleted from a replacement 'Price Schedule' once it has been filed on an original schedule until the department authorizes such deletion when the department makes a finding that the item is carried in wholesale and off-sale retail inventories in only very small quantities.

"(n) Transfer of Price Filing Obligation. When, for any reason, price filing responsibility for any item is transferred from one licensee to another, the price schedules of the licensee then on file will continue

in effect until replaced by an effective new filing by the successor which will be considered to be a schedule already on file.

"(o) Tax Increase or Government Order. Pursuant to an order issued by the department, any price schedule may be changed at any time to reflect changes in federal or state excise taxes on distilled spirits or to comply with the requirements of any order issued by the federal government and relating to price control.

"(p) Sales as Loss Leaders Prohibits. All distilled spirits minimum retail prices filed under the provisions of Section 24755 shall comply with all the provisions of said section including the provisions of subsection (d) which prohibits the sale of distilled spirits as a loss leader. Any licensee filing distilled spirits minimum retail prices below the purchasing retailer's cost of acquisition plus said retailer's cost of doing business as referred to in said subsection shall produce evidence to show that such price was filed to meet the legal price of a competitor selling the same article or product."

II

Answering Paragraph V, admits the allegations therein, except alleges that the

Appeals Board reversed the Department's decision on the ground that "the department's decision must be reversed because the record does not contain substantial evidence of publication of the price schedules as required by Section 24755 . . ."; Pennwick further alleges that at no time during the pendency of this proceeding has the Office of Administrative Procedure Hearing Officer, the Department, or the said Appeals Board taken any cognizance of issues of unconstitutionality of the said Fair Trade legislation or of the Department's rules promulgated and enforced pursuant thereto raised and advocated by Pennwick; that such failure to so take cognizance effectively deprived Pennwick of due process of law.

III

Answering Paragraph VI, admits that the allegations setting forth selected subparagraphs of Section 24755, Business and Professions Code, read as set forth therein, and alleges that the omitted subparagraphs set forth in Paragraph I hereinabove are material and indispensable and that said entire Section 24755 must be read in conjunction with Sections 24752, 24756 and 24757, Business and Professions Code, reproduced hereinabove in Paragraph I; that said Appeals Board committed error, as a matter of law, in reposing its reversal solely upon the ground of lack of substantial evidence of publication of prices; that other proper grounds for reversal, in addition to that relied upon by said Appeals Board, were and are the total absence of jurisdiction in the Department to administer,

maintain and enforce an arbitrary price structure for the use and benefit of a private segment of commercial enterprise, and the expenditure of public funds and resources in connection therewith; further, such legislation and the resulting conduct of the Department each constituted an excess of police power and a violation of Article XX, Section 22, California Constitution, proscribing any agency of the State from engaging in the sale of alcoholic beverages. In addition, Pennwick incorporates herein its Objections and Affirmative Defenses set forth in its Notice of Defense to the Department's accusation (Record of Hearing, Office of Administrative Procedure).

IV

Answering Paragraph VII, denies each and every allegation therein, and alleges that said Appeals Board properly exercised its jurisdiction pursuant to Section 23084, subdivision (a), (b), (c) and (d); alleges that the allegations recited by Petitioner are argumentative and speculative, and are conclusions drawn by Petitioner without factual foundation. Further, Pennwick alleges that, for reasons alleged hereinabove in Paragraphs I, II and III of its Answer, Petitioner and his Department: (a) proceeded without and in excess of any jurisdiction over Pennwick in connection with alleged violations of Fair Trade legislation; (b) did not proceed in the manner required by law; (c) further, that his and his Department's decision was not supported by the findings; and (d) the findings were not supported by substantial evidence in the light

of the whole record made before the Office of Administrative Procedure.

V

Answering Paragraph VIII, denies each and every allegation therein and incorporates by reference its answer set forth in Paragraph IV hereinabove, and alleges that there was no evidence that Pennwick had notice of any published prices during the period covered by the accusation.

VI

Answering Paragraph IX, denies each and every allegation therein and alleges that the Department has not suffered, and cannot and will not suffer, any injury for the reasons cited by Petitioner; that his allegations of injury are inadequate as a matter of law; that Petitioner has failed to show how and in what manner his or his Department's administrative discretion has been abridged, and how his and its jurisdiction will be or could be illegally circumscribed when, in fact, no such jurisdiction ever existed; that Petitioner has failed to show how and in what manner he has been aggrieved by the decision of the Appeals Board.

VII

Answering Paragraph X, denies each and every allegation therein and alleges that Petitioner, having acted without jurisdiction, has no right to seek relief from this Court.

WHEREFORE, Pennwick prays that:

(a) Petitioner be denied the Alternative and Peremptory Writs of Mandate sought herein;

(b) the Appeals Board decision reversing Petitioner and the Department of Alcoholic Beverage Control be affirmed;

(c) the Fair Trade Legislation, as set forth in the Alcoholic Beverage Control Act be declared null and void for constitutional infirmities;

(d) for all other proper relief.

DATED at Los Angeles, California, this 13th day of December, 1965.

LAW OFFICES OF
JACQUES LESLIE

By: Daniel A. Schiffer
Daniel A. Schiffer

Attorneys for Real Party in Interest - PENNWICK DORPORATION

9255 Sunset Boulevard -
Suite 920
Los Angeles, California 90069

CERTIFICATION

I, BION R. GREGORY, do hereby certify that I am the duly appointed, qualified and acting Principal Counsel and executive officer of the Department of Alcoholic Beverage Control of the State of California. I do hereby further certify that I have been duly authorized by action of said Department of Alcoholic Beverage Control to accept service of documents pertaining to petitions for writs of mandate and other actions brought against the Department of Alcoholic Beverage Control in any county of this State. Pursuant to this authorization, I have customarily and continuously accepted service on behalf of said Department to the knowledge and with the approval of the Director of said Department of Alcoholic Beverage Control.

I do further certify and acknowledge that I have this day, on behalf of said Department, accepted service of copies of the Answer to Petition for Writ of Mandate and Memorandum of Points and Authorities served on behalf of PENNWICK CORPORATION, a Real Party In Interest herein.

Executed in Sacramento, California, this 17th day of December, 1965.

/s/ Bion R. Gregory
BION R. GREGORY
Principal Counsel and Executive Officer DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL

CERTIFICATION

I, CHARLES P. JUST, do hereby certify that I am the duly appointed, qualified and acting Chief Counsel and executive officer of the Alcoholic Beverage Control Appeals Board of the State of California. I do hereby further certify that I have been duly authorized by action of said Appeals Board to accept service of documents pertaining to petitions for writs of mandate and other actions brought against the Appeals Board in any county of this State. Pursuant to this authorization, I have customarily and continuously accepted service on behalf of said Appeals Board to the knowledge and with the approval of the members of said Appeals Board.

I do further certify and acknowledge that I have this day, on behalf of said Appeals Board, accepted service of copies of the Answer to Petition for Writ of Mandate and Memorandum of Points and Authorities served on behalf of PENNWICK CORPORATION, a Real Party In Interest herein.

Executed in Sacramento, California, this 17th day of December, 1965.

/s/ Charles P. Just
Charles P. Just

Chief Counsel and Executive Officer
ALCOHOLIC BEVERAGE CONTROL APPEALS BOARD

Office-Supreme Court, U.S.
FILED
AUG 23 1968
CLERK

IN THE

Supreme Court of the United States

October Term, 1968
No. .....
~~32~~ 5

THE PENNWICK CORPORATION, a California corporation,

Appellant,

vs.

EDWARD J. KIRBY, Director of the Department of Alcoholic Beverage Control of the State of California,

Respondent.

MOTION TO DISMISS APPEAL FOR WANT OF A SUBSTANTIAL FEDERAL QUESTION

THOMAS C. LYNCH,
Attorney General of the State of California,
LYNN HENRY JOHNSON,
Deputy Attorney General of the State of California,
600 State Building,
Los Angeles, Calif. 90012,
Attorneys for Respondent.

Parker & Son, Inc., Law Printers, Los Angeles. Phone MA. 6-9171.

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IN THE

Supreme Court of the United States

October Term, 1968
No. .....

THE PENNWICK CORPORATION, a California corporation,

Appellant,

vs.

EDWARD J. KIRBY, Director of the Department of Alcoholic Beverage Control of the State of California,

Respondent.

MOTION TO DISMISS APPEAL FOR WANT OF A SUBSTANTIAL FEDERAL QUESTION

Respondent, pursuant to Rule 16 of the Revised Rules of the Supreme Court of the United States, moves that the appeal be dismissed on the ground that it does not present a substantial federal question.

Opinion Below

The opinion of the California Court of Appeal dated May 10, 1968, is attached hereto as Appendix "C".

Statutes Involved

The principal statutes concerned herein are sections 24749 through 24757 of the California Alcoholic Beverage Control Act (Calif. Bus. & Prof. Code, Div. 9)

attached hereto as Appendix A, and section 99 of Title 4 of the California Administrative Code attached hereto as Appendix B. These statutes involve California's *mandatory* minimum retail price maintenance system for liquor sold at retail in California.

Questions Presented

Appellant's Jurisdictional Statement presents the following questions:

(1) Whether or not the California Liquor Price Fixing Laws (§24755 of the Business and Professions Code) are invalid as being in violation of the Anti-Trust Laws of the United States (15 U.S.C.A. §§ 1, 2 and 45), because they do not come within the exceptions provided in the Miller-Tydings or McGuire Acts and because prices are fixed for goods that are not in fair and open competition.

(2) Whether or not section 24755 of the Business and Professions Code and Title 4, Rule 99, California Administrative Code are violative of the Due Process Clause of the Fifth Amendment and the Due Process and the Equal Protection Clauses of the Fourteenth Amendment of the United States Constitution.*

Respondent respectfully submits that such contentions are erroneous and that no substantial federal question is presented in this apeal.

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*At pages 4-5 of its Jurisdictional Statement appellant presents four other questions, subparagraphs 2(a), (b), (c) and (d), which it states are presented by the within appeal. However, in the body of its Jurisdictional Statement appellant brushes over these four questions by merely stating some of the questions again without any argument or citations of authority. We will not discuss these latter questions as we do not deem that appellant intended that they should be taken seriously.

Statement of the Case

This state court case involves the State of California's regulation and control laws, the retail sale of liquor in California under the Twenty-first Amendment to the United States Constitution, under Article XX, Section 22 of the California Constitution and under the California Alcoholic Beverage Control Act (Calif. Bus. & Prof. Code, Div. 9 §§ 23000 to 25762).

This case deals specifically with the California Alcoholic Beverage Control Act's *mandatory* minimum retail price maintenance system for the retail sale of liquor in California. This very same type of alcoholic beverage control system has already been before this Honorable Court in *Schwartz v. Kelly*, 140 Conn. 176, 99 A.2d 89 (1953), and this Court dismissed the appeal therein for want of a substantial federal question, 346 U.S. 891.

The main thrust of this case in the California Court of Appeal involved a *state issue* as to what constituted proper publication of the minimum retail prices under former section 24755(b) of the California Alcoholic Beverage Control Act. In addition, appellant also made an attack on the validity of section 24755 of the California Alcoholic Beverage Control Act, as amended in 1961, on the grounds that it allegedly involved an unlawful delegation of legislative power and that it allegedly eliminated any requirement of fair and open competition.

While the appellant raised various possible federal questions in his proceedings before the California Department of Alcoholic Beverage Control and the California Alcoholic Beverage Control Appeals Board, we

would note that the California Alcoholic Beverage Control Appeals Board's decision rests solely upon the *state issue* regarding what constitutes proper publication of the minimum retail prices under the provisions of former section 24755(b) of the California Alcoholic Beverage Control Act.

As shown by the California superior court clerk's transcript, appellant did not issue, urge or attempt to litigate in the California superior court the validity of the statutes involved herein on either state or federal grounds. The pleadings and judgment of the California superior court clearly demonstrate that this case in the superior court involved only the singular *state issue* regarding publication of the prices.

Only when the case reached the California Court of Appeal, and following the filing of the California Department of Alcoholic Beverage Control's opening brief dealing with the singular *state issue* concerning the publication of the prices, did the appellant raise for the first time in the California courts the validity of the statutes involved herein.

In the California Court of Appeal appellate challenged the validity of the statutes on the ground that the statutes allegedly violated due process under the California Constitution in that the statutes allegedly provided for an unlawful delegation of legislative power, and on the ground that the states allegedly violated the California Cartwright Act (Calif. Anti-Trust Act) because of an alleged elimination of fair and open competition. This appellant did not raise any issue with respect to the statutes establishing two trading areas in California.

ARGUMENT

I

Both Traditionally and Under the Twenty-First Amendment, a State Has Broad Regulatory Powers Over Alcoholic Beverages Destined for Use, Distribution or Consumption Within Its Borders

Both traditionally[1] and under the Twenty-first Amendment[2] the power of a state to regulate and control alcoholic beverages destined for use, distribution or consumption within its borders—including complete prohibition as well as any restriction falling short of prohibition even if discriminatory in nature—has been unconditional.

Except for cases involving: (a) foreign commerce[3], (b) import-export[4], (c) interstate commerce in transit

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[1]*Mugler v. Kansas,* 123 U.S. 623, 657-671 (1887); *Crowley v. Christensen,* 137 U.S. 86, 91 (1890); *Giozza v. Tiernan,* 148 U.S. 657, 661-662 (1892); *Cronin v. Adams,* 192 U.S. 108, 114-115 (1904); *Cox v. Texas,* 202 U.S. 446, 451 (1906); *Purity Extract Co. v. Lynch,* 226 U.S. 192, 201 (1912); *Seaboard Air Line Ry. v. North Carolina,* 248 U.S. 298 (1917); *Crane v. Campbell,* 245 U.S. 304, 307 (1917); *McCormick & Co. v. Brown,* 286 U.S. 131, 140-141 (1932).

[2]*State Board of Equalization v. Young's Market,* 299 U.S. 59, 63-64 (1963); *Mahone v. Triner Corp.,* 304 U.S. 401 (1938); *Joseph S. Finch & Co. v. McKittrick,* 305 U.S. 395 (1939); *Indianapolis Brewing Co. v. Liquor Commission,* 305 U.S. 391, 394 (1939); *Ziffrin v. Reeves,* 308 U.S. 132, 138 (1939); *United States v. Frankfort Distilleries, Inc.,* 324 U.S. 293 (1945).

[3]U.S. Const. Art. I, § 8, cl. 3; *Hostetter v. Idlewild Bon Voyage Liquor Corp.,* 377 U.S. 324 (1964); *Department of Alcoholic Beverage Control v. Ammex Warehouse Co.,* 378 U.S. 124 (1964).

[4]U.S. Const. Art. I, § 10, cl. 2; *Department of Revenue v. James B. Beam Distilling Co.,* 377 U.S. 341 (1964); *Low v. Austin,* 13 Wall. 29 (1871); and see *Parrott & Co. v. San Francisco,* 131 Cal.App. 2d 332, 280 P.2d 881 (1955).

through the regulating state[5], (d) federal enclaves[6], and (e) possible intolerable burdens on interstate commerce *outside* of the regulating state[7], this Honorable Court has consistently denied certiorari or dismissed appeals for want of a substantial federal question in cases involving state regulation and control of alcoholic beverages destined for use, distribution or consumption within the state's borders.[8]

As but recently set forth by this Honorable Court in *Seagram & Sons v. Hostetter,* 384 U.S. 35 at 41-43 (1966):

> ". . . The appellants attack § 9 on many constitutional fronts. They contend that its provisions place an illegal burden upon interstate commerce, conflict with federal antitrust legislation and thus fall under the Supremacy Clause, and violate both the Due Process Clause and the Equal Protection Clause of the Fourteenth Amendment. We find all these contentions without merit.
>
> "Consideration of any state law regulating intoxicating beverages must begin with the Twenty-

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[5]*Duckworth v. Arkansas,* 314 U.S. 390 (1941); *Carter v. Virginia,* 321 U.S. 131 (1944); *Gordon v. Texas,* 355 U.S. 369 (1958).

[6]*Collins v. Yosemite Park Co.,* 304 U.S. 518 (1938).

[7]*Seagram & Sons v. Hostetter,* 384 U.S. 35 (1966). Cf, *United States v. Frankfort Distllleries,* 324 U.S. 293, 299 (1945).

[8]*Schwartz v. Kelly,* 346 U.S. 891 (1953), appeal dismissed for want of a substantial federal question; *California v. Washington,* 385 U.S. 64 (1958), motion to file complaint denied; *Hooper v. Duncan,* 379 U.S. 27 (1964), appeal dismissed for want of a substantial federal question; *Plaza Liquor Stores, Inc. v. City of Atlanta,* 381 U.S. 914 (1965), cert. denied; *Laird & Co. v. Cheney,* 385 U.S. 371 (1966), appeal dismissed for want of a substantial federal question; *Inman v. City of Miami,* 389 U.S. 1048 (1968), cert. denied.

First Amendment, the second section of which provides that: 'The transportation or importation into any State, Territory, or possession of the United States for delivery or use therein of intoxicating liquors, in violation of the laws thereof, is hereby prohibited.' As this Court has consistently held. 'That Amendment bestowed upon the states broad regulatory power over the liquor traffic within their territories.' (Citations) Just two Terms ago we took occasion to reiterate that 'a State is totally unconfirmed by traditional Commerce Clause limitations when it restricts the importation of intoxicants destined for use, distribution, or consumption within its borders.' (Citations) . . .

". . . the present case concerns liquor destined for use, distribution, or consumption in the State of New York. In that situation, the Twenty-first Amendment demands wide latitude, for regulation by the State. We need not now decide whether the mode of liquor regulation chosen by a State in such circumstances could ever constitute so grave an interference with a company's operations elsewhere as to make the regulation invalid under the Commerce Clause.[18] (Citation) No such situation is presented in this case. The mere fact that § 9 is geared to appellants' pricing policies in other States is not sufficient to invalidate the statute." . . . (Footnote omitted.)

In *Indianapolis Brewing Co. v. Liquor Commission*, 305 U.S. 391, 394 (1939), this Court held that state alcoholic beverage control laws, even though discriminatory in nature, could not be considered as in violation

of the due process clause of the Fourteenth Amendment. And to the same point see *Mahoney v. Triner Corp.*, 304 U.S. 401 (1938) and *Ziffrin, Inc. v. Reeves*, 308 U.S. 132, 138 (1939).

In the recent case of *California v. Washington*, 358 U.S. 64 (1958), wherein the State of California sought to prevent the State of Washington from imposing discriminatory regulations on California wines being marketed in the State of Washington, this Court *refused* to hear the case, citing in its per curiam opinion: U.S. Constitution, Amend. XXI, §2; *Indianapolis Brewing Co. v. Liquor Commission, supra; Joseph S. Finch & Co. v. McKittrick*, 305 U.S. 395; *Mahoney v. Joseph Triner Corp., supra;* and *State Board of Equalization v. Young's Market*, 299 U.S. 59.

Perhaps the most striking expression of the dominant role played by the Twenty-first Amendment with respect to state regulation of alcoholic beverages is that found in *State Board of Equalization v. Young's Market Co.*, 299 U.S. 59, 63-64 (1936):

> ". . . A classification recognized by the Twenty-first Amendment cannot be deemed forbidden by the Fourteenth."

Since possession and sale of alcoholic beverages are not inherent rights of citizenship nor proprietary rights[9], and inasmuch as the Twenty-first Amendment constitutionally separates alcoholic beverages apart from all other commodities, this Court has held that the due process and equal protection clauses of the

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[9] *Crowley v. Christensen*, 137 U.S. 86, 91 (1890); *Crane v. Campbell*, 245 U.S. 304, 308 (1917).

Fifth and Fourteenth Amendments are not controlling with respect to a state's regulation of alcoholic beverages within the state's borders.[10]

And with respect to the California Alcoholic Beverage Control Act's mandatory minimum retail price maintenance requirements for liquor to be sold at retail in California, this Honorable Court has clearly set forth that "a State is totally unconfined by traditional Commerce Clause limitations when it restricts the importation of intoxicants destined for use, distribution, or consumption within its borders".[11]

II

The California Alcoholic Beverage Control Act's Mandatory Minimum Retail Price Maintenance System Regulates the Retail Sale of Liquor Within the Borders of California and Provides for Orderly Marketing Conditions and the Promotion of Temperance in Connection Therewith

As part of its overall statutory scheme for the regulation and control of alcoholic beverages destined for use, distribution or consumption within its borders, California has for nearly thirty (30) years (1939-1968) prescribed a *mandatory* minimum retail price main-

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[10]U.S. Const., 21st Amendment; *California v. Washington*, 358 U.S. 64 (1958), and the authorities cited in footnotes 1 and 2, *supra*.

[11]*Seagram & Sons v. Hostetter*, 384 U.S. 35, 42 (1966); *Hostetter v. Idlewild Bon Voyage Liquor Corp.*, 377 U.S. 324, 330 (1964); *Department of Revenue v. James Beam Distilling Co.*, 377 U.S. 341, 344 (1964); *United States v. Frankfort Distilleries Inc.* 324 U.S. 298, 301 (1945); and see *Washington Brewers Institute v. United States*, 137 F.2d 964 (1943), cert. denied 320 U.S. 776; *Schwartz v. Kelly*, 99 A.2d 89 (1953), cert. denied 346 U.S. 891.

tenance system for the retail sale of liquor in California.[12]

The purpose and function of the California Alcoholic Beverage Control Act's mandatory minimum retail price maintenance system for liquor[13]—the promotion of both orderly marketing conditions and temperance in the retail sale of liquor in California by the elimination of price wars and cut-rate sales—is set forth at length in the California Supreme Court's recent reaffirmation[14] of the validity of said laws in *Wilke & Holzheiser, Inc. v. Department of Alcoholic Beverage Control,* 65 Cal.2d 349 (Dec. 1966), 420 P.2d 735, wherein the California Supreme Court comprehensively dealt with and rejected the very same arguments which this appellant is now attempting to advance in his jurisdictional statement herein.

As set forth by the California Supreme Court in *Wilke & Holzheiser, Inc. v. Department of Alcoholic Beverage Control, supra,* 420 P.2d 735 at 742-748, (most footnotes omitted):

> "Plaintiff first contends that these provisions are unconstitutional because they exceed the police power of the state. In passing upon the validity

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[12]§ 99, Title IV, Calif. Admin. Code and Rule 42, Calif. State Board of Equalization (1939-1947); §§ 55.6 and 24749 through 24881, California Alcoholic Beverage Control Act (Div. 9, Calif. Bus. & Prof. Code) (1947-1968).

[13]The California Alcoholic Beverage Control Act's *mandatory* minimum retail price maintenance law for liquor (§§ 24749 to 24757, Calif. Bus. & Prof. Code) is to be distinguished from California's *permissive* general fair trade law for ordinary commodities (§§ 16900 to 16905, Calif. Bus. & Prof. Code).

[14]See the California Supreme Court's earlier decision unholding the California Alcoholic Beverage Control Act's mandatory minimum retail price maintenance system for liquor: *Allied Properties v. Department of Alcoholic Beverage Control,* 53 Cal. 2d 141 (1959), 346 P.2d 737.

of that contention, we exercise an extraordinary power over a coordinate branch of government and perform a correspondingly narrow function: we simply determine whether the statute reasonably relates to a legitimate governmental purpose. In so doing, we find the requisite relationship in the absence of an unquestionable contrary showing. (Los Angeles Met. Transit Authority v. Public Util. Com. (1963) 59 Cal.2d 863, 867; Wholesale T. Dealers v. National etc. Co. (1938) 11 Cal.2d 634, 646.) We must not confuse reasonableness in this context with wisdom. '"The doctrine . . . that due process authorizes courts to hold laws unconstitutional when they believe the legislature has acted unwisely . . . has long since been discarded . . ." Ferguson v. Skrupa, 372 U.S. 726, 728-730.' (Joseph E. Seagram & Sons v. Hostetter (1966) 384 U.S. 35, 47.)

"To incant these precepts in form and ignore them in substance is to disregard the most basic postulates of representative government; yet, as one court has observed, 'the courts of last resort that have rejected fair trade acts on constitutional grounds seem to have . . . done so because of an unwillingness to accept the legislative judgment as to the economic facts.' (Home Utilities Co. v. Revere Copper & Brass, Inc., supra, 209 Md. 610, 617.) On such debatable matters the Legislature properly serves as the court of last resort. When, as in this case, 'appeal is made to liberties which derive merely from shifting economic arrangements' (Kovacs *v.* Cooper (1949) 336 U.S. 77, 95 (Frankfurter, J., concurring)),

the judgment of the Legislature reaches this tribunal with a momentum for respect lacking when the Legislature tampers with 'those liberties of the individual which history has attested as the indispensable conditions of an open as against a closed society.' (Ibid.) With these admonitions in mind, we turn to plaintiff's contention that the retail price maintenance provisions of the Alcoholic Beverage Control Act bear no reasonable relation to any legitimate governmental purpose.

"The Legislature adopted the Alcoholic Beverage Control Act 'for the protection of the safety, welfare, health, peace, and morals of the people of the State, to eliminate the evils of unlicensed and unlawful manufacture, selling and disposing of alcoholic beverages, and to promote temperance in the use and consumption of alcoholic beverages.' (Bus. & Prof. Code, § 23001.) With regard to the retail price maintenance provisions specifically, the Legislature made its purpose plain: It is the declared policy of the State that it is necessary to regulate and control the manufacture, sale, and distribution of alcoholic beverages . . . for the purpose of fostering and promoting temperance in their consumption and respect for and obedience to the law. In order to eliminate price wars which unduly stimulate the sale and consumption of alcoholic beverages and disrupt the orderly sale and distribution thereof, it is hereby declared as the policy of this State that the sale of alcoholic beverages should be subjected to certain restrictions and regulations. The necessity for the enactment of provisions of this chapter is, therefore, declared as

a matter of legislative determination.' (Bus. & Prof. Code, § 24749.)

"The promotion of temperance in the consumption of alcoholic beverages and of orderly conditions in their marketing clearly constitute proper legislative objectives. The declared purposes of the Alcoholic Beverage Control Act in general and of its retail price maintenance provisions in particular are therefore entirely legitimate, and we must sustain the price maintenance provisions if they bear a reasonable relationship to any of those purposes.

"We turn first to the purpose of promoting temperance. The retail price maintenance provisions proceeded on the assumption that 'the elimination at the retail level of price cutting, bargain sales, and advertising of low prices tends to reduce excessive purchases of alcoholic beverages.' (Allied Properties v. Dept. of Alcoholic Beverage Control, supra, 53 Cal.2d 141, 148.) We cannot call such an assumption irrational. In upholding the validity of state statute limiting retail liquor licenses to two per person, the New Jersey Supreme Court held that in formulating its policy the Legislature could properly accept 'widely held views as to sound liquor control,' including the 'beliefs that the consumption of liquor is elastic rather than inelastic, [and] that price cuttings and their advertisement, along with comparable practices, are undesirable in the liquor field as tending to stimulate consumption. . . .' (Grand Union Co. v. Sills (N.J. 1964) 204 A.2d 853, 859.)

"Our Legislature may have sought to prevent the special inducement to purchase liquor which results from loss leaders, price-cutting and bargain sales at the retail level. (Allied Properties v. Dept. of Alcoholic Beverage Control, supra, 53 Cal.2d 141, 148-149.) That the Legislature did not also seek to prevent intemperance by limiting the volume of liquor sales, by regulating competition among producers and wholesalers, or by establishing high liquor prices generally, creates no constitutional infirmity. As we said in Board of Education of City of Los Angeles v. Watson (1966) 63 Cal.2d 829, 833, 'The Legislature is not bound, in order to adopt a constitutionally valid statute, to extend it to all cases which might possibly be reached, but is free to recognize degrees of harm and to confine its regulation to those classes of cases in which the need is deemed to be the most evident.'

"The selectivity of our Legislature's approach to the problem of intemperance might reflect a variety of entirely legitimate considerations. Thus the Legislature could have reasoned that some people might respond more impulsively to bargain sales of their preferred brand than to bargains offered by competing brands. Or the Legislature might have concluded that unregulated competition among the relatively few liquor producers and wholesalers would not unduly stimulate liquor consumption but that similar competition among the large number of retailers, who come into direct contact with consumers and who are more vulnerable to economic pressure, would stimulate selling

practices calculated to induce intemperance. We cannot say that all of these suppositions would have been 'palpably arbitrary and beyond rational doubt erroneous.' (In re De La O (1963) 59 Cal. 2d 128, 153; State of California etc., v. Ind. Acc. Com. (1957) 48 Cal.2d 365, 371.)

"Plaintiff calls our attention to the fact that the New York Moreland Commission (see New York State Legislative Annual (1964) 401-408, 484-489, 498-500) found that mandatory retail price maintenance did not significantly reduce the consumption of alcoholic beverages. We note, however, that the response to the Moreland Commission Report in New York came from the Legislature (Session Laws of New York, 1964, ch. 531, § 11), not the courts. Legislative revision of a statute cannot be equated to its death knell by judicial decree.

"We turn to the second legislative purpose: the promotion of the orderly sale and distribution of alcoholic beverages. Retail price wars among liquor distributors may encourage retailers, struggling to withstand the pressure of ruinous competition, to sell liquor below cost in violation of Business and Professions Code section 17043 or to transgress the regulatory laws governing retail liquor distribution (Bus. & Prof. Code, §§ 25600-25666).[9] To the extent that the retail price

"[9]As one court put it; 'The liquor industry is *sui generis*. If conditions of competition come about that threaten the economic existence of a vast number of small retailers, there exists a real threat that they may take illegal shortcuts to maintain their solvency, to the detriment

(This footnote is continued on the next page)

maintenance provisions eliminate retail price wars in the liquor industry, they undeniably discourage such disruptive practices.

"The Legislature may likewise have concluded that giant retailers and chain markets should be afforded no opportunity to use loss leaders in branded liquor to attract customers in disregard of Business and Professions Code section 17044 and thus ultimately to force smaller retailers out of business. Such tactics, the Legislature may have thought, would disrupt orderly distribution by endangering the continued vitality of one method of marketing: the corner grocery store. The Legislature may have decided not to expose these channels of distribution to possible economic destruction through manipulation by powerful competitors, of so highly volatile and attractive a product as branded liquor.

"Plaintiff answers that the instant legislation reaches unnecessarily far in this respect because the kinds of marketing disruptions that we have described may be curtailed by present statutes. But, in the first place, even assuming that the Legislature did no more than fashion further means of proscribing previously prohibited practices (Bus. & Prof. Code, §§ 25600-25666; Id., §§ 17000-17101), we see no ground for unconstitutionality in such duplication. The possibility

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of the industry and the harm of the public.' (Grand Union C. v. Sills (N.J. 1963) 194 A.2d 591, 595, affd. Grand Union Co. v. Sills, supra, 204 A.2d 853. See also Schwartz v. Kelly, supra, 140 Conn. 176, 180; Supreme Malt Products Co., Inc. v. Alcoholic Beverage Control Commission, supra, 334 Mass. 59, 62.)

that 'other less stringent . . . regulations might have sufficed is not our concern; that is a matter lying within the discretion of the legislative body.' (Nat. Milk etc. Assn. v. City etc. of S.F. (1942) 20 Cal.2d 101, 115.)[10]

"In the second place, the Legislature may have intended more than the fortification of existing statutory regulations. It may have sought to fill the gap between price-cutting procedures pursued in practice and those proscribed by law. The Unfair Practices Act (Bus. & Prof. Code, §§ 17000-17101) does not offer a facile means for the prevention of all below cost and loss leader selling; the requirements of proof of such selling under the act are stringent and for this reason the act is rarely invoked. The Legislature could certainly have concluded that such legislation would be of small comfort and little aid to independent retailers in their struggle against large-scale price-cutting competitors.

"Whatever dangers the Legislature thought implicit in disorderly marketing, we cannot question the wisdom of its concern. As we said in another context, 'Where the Legislature has determined that a defined condition or activity is a nuisiance, it would be a usurpation of the legislative power for a court to arbitrarily deny enforcement merely be-

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"[10]The principle that even a legitimate governmental purpose 'cannot be pursued by means that broadly stifle fundamental personal liberties when the end can be more narrowly achieved' (Shelton v. Tucker (1960) 364 U.S. 479, 488) has no application to a purely economic regulation, impinging in no significant way upon the dignity or freedom of the individual.

cause in its independent judgment the danger caused by a violation was not significant.' (City of Bakersfield v. Miller (1966) 64 A.C. 95, 102.)

"Finally, plaintiff contends that the retail price maintenance provisions, even if reasonably related to either or both of their declared objectives, cannot be justified as an exercise of the police power because their 'real' purpose and effect is not to regulate the sale of alcoholic beverages in the public interest but to swell the profits of the liquor industry.

"Insofar as plaintiff's contention focuses on the legislative *purpose,* it amounts to a suggestion that we should not take the Legislature at its word but should instead decide for ourselves, by a process which remains unexplained, what the Legislature 'really' intended to achieve by enacting the provisions in question. Although several courts have acceded to that suggestion, we do not believe that we are either authorized or equipped to undertake so ill-defined and hazardous an inquiry. '[T]his court may not presume that in reaching its decision [the Legislature] acted upon improper motives. ". . . a judiciary must judge by results, not by the varied factors which may have determined legislators' votes . . ." [citations].' (Werner v. Southern Cal. etc. Newspapers, supra, 35 Cal.2d 121, 129.) 'Nor can legislation be set aside by courts because of the fact, if it be such, that it has been sponsored and promoted by those who advantage from it [footnote omitted].' (Cohen v. Beneficial Loan Corp. (1949) 337 U.S. 541, 551.)

"Insofar as plaintiff's contention focuses on the legislative *effect,* we cannot fail to recognize it as an invitation to hold the law invalid because we disagree with its desirability. As we have said, we cannot invalidate legislation merely because we do not approve of its potentially beneficent impact upon a particular segment of society.

"At its base, the argument that the statute is unconstitutional because of its supposed bias in favor of the liquor industry rests upon a wholly unrealistic view of the legislative process. As our social and economic life grows in complexity, legislation necessarily increases in the differentiation of its techniques and in the specialization of its objectives. Thus the endeavor to achieve the general welfare of the whole through the special weflare of each part becomes ever more necessary. By protecting the interests of complaining constituents through legislation tailored to meet their particular needs, the Legislature can seek to maximize the satisfaction of society as a whole. Surely courts should not inject themselves into this inherently pluralistic process of compromise by attempting to reserve to themselves a power to veto the balance struck because of a bare belief in its undesirability.

"Plaintiff's second basic challenge to the constitutionality of the retail price maintenance provisions is that they unlawfully delegate legislative power by enabling each producer and wholesaler to set the price below which retailers may not sell his product. We rejected precisely that contention in Allied Properties v. Dept. of Alcoholic Beverage Control, supra, 53 Cal.2d 141, 149-152, just

as we rejected a similar contention in sustaining the general Fair Trade Act (Bus. & Prof. Code, §§ 16900-16905) against a challenge of unlawful delegation in Scovill Mfg. Co. v. Skaggs etc. Drug Stores, supra, 45 Cal.2d 881, 888. We see no reason to depart from those holdings.

"To contend that the Alcoholic Beverage Control Act unlawfully delegates legislative power is to misconceive the nature of the power which is purportedly delegated. The power we analyze here finds expression in the private act of the producer in entering into a contract setting a price for the resale of his own brand. *Scovill* tells us that this act is not the performance of a legislative function and not the exercise of an unlawfully delegated power. Nor does plaintiff directly question *Scovill.* Yet, if the producer's contractual designation of a resale price binding on all retailers is not the exercise of an unlawfully delegated legislative power, the statutory *requirement* that he designate that price cannot transform his act into the exercise of such a power. The statutory requirement clearly confers no *power* on the producer that he would not have possessed without it.

"*Allied Properties* makes this point abundantly clear. In describing the alleged delegation, the opinion in *Allied Properties* states that 'the function performed by the persons who assertedly exercise delegated legislative powers is the same under the general Fair Trade Act and the Alcoholic Beverage Control Act.' (P. 149.) The opinion points out that the act of designating a resale price binding on

all retailers is '"no more legislative in character than are other acts . . . of private parties undertaken as a prerequisite to the application of a statute."' (P. 149.)

"To argue that the Alcoholic Beverage Control Act unlawfully delegates legislative power because it is a 'price-fixing act' is to overlook the crucial distinction between the fixing of a price for *all* products in a given market and the setting by the producer of the retail price at which *his own* product is to be sold.[13] As *Allied Properties* explains (pp. 151-152), this distinction finds dramatic illustration in the difference between the instant legislation and the statute involved in State Board of Dry Cleaners v. Thrift-D-Lux Cleaners (1953) 40 Cal.2d 436.

"The court in *Thrift-D-Lux* declared unconstitutional a statute which delegated to the State Board of Dry Cleaners the power to fix minimum prices. (Bus. & Prof. Code, §§ 9560-9567, repealed by Stats. 1957, ch. 1691, § 11.) The statute entrusted the board with the power to decide, in terms of the public health and safety, which cities should have minimum price schedules, which serv-

"[13]The Alcoholic Beverage Control Act delegates to the producer no power which he could not in theory achieve unilaterally. The producer could, subject of course to the antitrust laws (see, e.g., Simpson v. Union Oil Co. (1964) 377 US 13)) maintain his own retail outlets or place his goods on consignment and thereby reserve full control over their retail price without the aid of price maintenance legislation of any kind. The infeasibility of such vertical integration in the liquor industry should not be permitted to obscure the fact that the Legislature has simply attempted to simulate some of the marketing conditions which would prevail if vertical integration were to take place.

ices should be included in those schedules, and what prices should be charged for the services. As *Allied Properties* points out, the court in *Thrift-D Lux,* in holding the statute unconstitutional, relied on the ground that there was a delegation of legislative power without ascertainable standards to an administrative board composed mainly of members of the industry who would participate in fixing prices to be charged by their competitors. . . . On the other hand it was held in Scovill Mfg. Co. v. Skaggs, etc. Drug Stores, supra, 45 Cal.2d 881, 887-888, that there was no delegation of legislative power where manufacturers, acting in their private capacity under the general Fair Trade Act, fixed the prices for which their own products were to be sold at retail by persons who were not their competitors. The distinguishing factor is that the dry cleaners' board was directed to fix uniform minimum prices for the services of all dry cleaners in limited areas on the basis of what it believed was required by public health and safety, whereas under the general Fair Trade Act each manufacturer is to fix retail prices for his own products in accord with his personal interest.' (Allied Properties v. Dept. of Alcoholic Beverage Control, supra, 53 Cal.2d 141, 151-152.)

"When the power which the Legislature purports to confer is the power to regulate the business of one's competitors, as in *Thrift-D-Lux,* or the power to exclude potential competitors from an entire industry or occupation, as in Blumenthal v. Board of Medical Examiners (1962) 57 Cal.2d 228, 235-236, a real danger of abuse arises, and the

courts accordingly insist upon stringent standards to contain and guide the exercise of the delegated power.

"A similar insistence upon stringent standards would serve little if any purpose in the case of the Alcoholic Beverage Control Act. As we noted in *Allied Properties* (53 Cal.2d pp. 151-152), that act authorizes no individual or group to exercise either regulatory or exclusionary power over any competitor, actual or potential. The Legislature has not authorized anything resembling 'price-fixing' in the traditional, horizontal sense: it has authorized no one to fix the price charged by a competitor. Thus the Alcoholic Beverage Control Act does not create the special danger threatened by a statute which delegates *industry-wide* regulatory power to interested members of the regulated industry.

"To the extent that the retail price maintenance provisions enable a producer to control the bargaining process between those who sell and those who buy his own product, the Legislature could reasonably assume that competition among producers,[15] coupled with the bargaining power of

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"[15]At the time of the transactions in question, section 24755 of the Business and Professions Code required, and section 24750 permitted, retail price maintenance only as to brands which were 'in fair and open competition with alcoholic beverages of the same general class.' Although some commentators took the view that this limitation had little practical effect (see, e.g., Herman, Free and Open Competition (1957) 9 Stan.L.Rev. 323, 327), the Legislature could reasonably have reached a different conclusion. Moreover, apart from the 'fair and open competition' clause, the Legislature, as we said in Allied Properties (53 Cal.2d p. 148), 'could reasonably proceed on the theory that the public will be adequately protected against excessive prices by the ordinary play of competition between manufacturers.'

those low-overhead retailers who desire lower retail prices, would provide a safeguard against excessive prices. In all probability, that safeguard is at least as effective as any which the Legislature could be expected to provide by promulgating explicit standards for the setting of retail prices, enforcible by an administrative or judicial agency.[16] To impose a requirement of expressed legislative standards would here reflect 'little more than a judicial fetish for legislative language, the recitation of which [would provide] no additional safeguards to persons affected by the exercise of the delegated authority.' (Warren v. Marion County (1960) 222 Ore. 307, 314; see also 1 Davis, Administrative Law Treatise, § 2.15, pp. 148-151 and 1965 Supp., pp. 52-55; Jaffe, Law Making by Private Groups (1937) 51 Harv.L.Rev. 201, 248-251.)

"In light of these observations, we find transparently erroneous the arguments that the statute unlawfully delegates 'price-fixing' power because (1) the producer *must* set the price which will be observed in resale; (2) the law imposes an obligation upon all people in this state to observe that price; and (3) the violation of the act is a 'public offense.'

"All three arguments ignore the basic difference between a statute requiring the unilateral designation by each producer of the resale price of his own product and a statute requiring the multi-

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"[16]The extraordinary difficulty of formulating meaningful price guidelines suggests that any legislative effort to do so here might well have proven utterly futile. (See, e.g., Fulda, Resale Price Maintenance (1954) 21 U.Chi. L.Rev. 175, 182 fn. 33.)

lateral observance by all competitors of a fixed minimum price of a commodity. That the private act of specifying a resale price is lifted by the statute beyond the contracting producer and retailer to a publicly enforced observance by all retailers within the state does not convert the legislation into a 'price-fixing' statute, since the law still empowers no one to regulate the retail price of any commodity.

"Although the Alcoholic Beverage Control Act *requires* (Bus. & Prof. Code, § 24755), whereas the Fair Trade Act merely *permits* (Bus. & Prof. Code, § 16902), producers and wholesalers to set retail prices, this mandatory aspect of the Alcoholic Beverage Control Act 'does not render the function of a producer or wholesaler legislative in character but, to the contrary, decreases his discretion since he is not free to determine whether fair trading should occur. While mandatory fair trading means that retailers cannot obtain merchandise free from price restrictions, this is due to the determination of the Legislature, not the action of the producers and wholesalers.' (Allied Properties v. Dept. of Alcoholic Beverage Control, supra, 53 Cal.2d 141, 150.) The mandatory feature of the act endangers none of the interests which the anti-delegation doctrine seeks to protect, since it threatens neither the principle that truly fundamental issues should be resolved by the Legislature nor the precept that a grant of authority should be accompanied by safeguards adequate to prevent its abuse. Thus it provides no reason to hold that the act unconstitutionally delegates legislative power."

III

The 1961 Amendments to the California Alcoholic Beverage Control Act's Mandatory Minimum Retail Price Maintenance System for Liquor Do Not Eliminate the Requirements of Fair and Open Competition and Do Not Conflict With the Federal Anti-Trust Laws

Appellant erroneously contends in his jurisdictional statement that "When the California Superior Court, For the City and County of San Francisco reversed a license revocation because there had been no finding that the liquor sold had been in free and open competition, the statute was changed so that free and open competition is no longer a requirement." (Appellant's Jurisdictional Statement, p. 14.) Hence, argues the appellant, California's mandatory minimum retail price maintenance system for liquor is now in violation of the federal anti-trust laws because the requirement of free and open competition has been eliminated by the 1961 amendment to the California law.

Such a contention rests upon erroneous premises, completely ignores the specific holding of the California Court of Appeal herein with respect to same, and its totally without merit.

Prior to 1961, the California Alcoholic Beverage Control Act's mandatory minimum retail price maintenance system for liquor involved the use of the so-called "fair trade contract" as the vehicle for filing the minimum resale price with the California Department of Alcoholic Beverage Control. Following attacks by violating licensees on the validity of the "fair trade contracts" on various quasi-contract grounds (i.e. no mutuality of obligation, failure of consideration, non-sign-

er, etc., see *De Martini v. Department of Alcoholic Beverage Control,* 215 Cal. App. 2d 787 (1963), 30 Cal. Rptr. 668) the California Legislature in 1961, while retaining and authorizing "fair trade contracts" under the California Alcoholic Beverage Control Act (§§ 24750-24753, Calif. Bus. & Prof. Code), amended section 24755 of the Alcoholic Beverage Control Act so as to substitute a "minimum retail price schedule" in place of the "fair trade contract" itself as the vehicle to be used in filing the minimum retail prices with the Department of Alcoholic Beverage Control.

The use of the "minimum retail price schedule" as the filing vehicle in California's mandatory minimum retail price maintenance system is adopted from Connecticut's mandatory minimum retail price maintenance system for alcoholic beverages, which, as heretofore noted, has already been the subject of an appeal to this Honorable Court and this Court dismissed the appeal for want of a substantial federal question. (*Schwartz v. Kelly,* 140 Conn. 176, 99 A.2d 89, 346 U.S. 891.)

It may be noted that besides *California* and *Connecticut,* the unilateral filing of a minimum retail price schedule is the vehicle used to establish minimum retail prices in *Hawaii* (Rev. Laws of Hawaii 1955, Title 21, Ch. 159), *Massachusetts* (Mass. Gen. Laws, Ch. 138, § 25C), *Minnesota* (Laws of 1951, M.S.A. 340.97-340.978), *New Jersey* (Dept. of Law and Public Safety, Div. of A.B.C., State Reg. #30), and *New York* (wine) (N.Y. Consol. Laws, Ch. 3-B, § 101-bbb).

As set forth in the decision of the California Court of Appeal in *Reimel v. Alcoholic Beverage Control Appeals Board,* 256 A.C.A. 188, 64 Cal. Rptr. 26, at 34-

5 (1968) where the court was considering the same rgument which the appellant makes here:

"Nor do we deem the absence from section 24755 of specific requisite that the brands be in 'fair and open competition with alcoholic beverages of the same general class produced by others' to create a constitutional infirmity. Such fair and open competition is a positive requirement of the Cartwright Antitrust Law (Bus. & Prof. Code, §§ 16700-16758.) Minimum retail price schedules resulting from any combination for the purpose of stifling fair and open competition would be an offense against that law. (Citation.)

"Respondents complain that the Department is no longer required under section 24755 to produce affirmative evidentiary proof, or make express findings, that the brands involved are in such fair and open competition. This contention assumes that there was such a requirement prior to 1961. DeMartini v. Department of Alcoholic Beverage Control, 215 Cal.App.2d 787, 808-809, considering the pre-1961 Act, held that certain statutory presumptions[8] constituted evidence, in similar proceedings before the Department, that the filed price schedules were in fair and open competition. (Citations.) DeMartini v. Department of Alcoholic Beverage Control, 215 Cal.App. 2d, supra, pp. 813-814, also held that express findings that the products were in fair and open competition were not required." (Footnote omitted.)

Notwithstanding the power given to the states under the Twenty-first Amendment with respect to alcoholic

beverages destined for use, distribution or consumption within the states' borders (See Argument I, *supra*), this instant case does *not* present a conflict between state power under the Twenty-first Amendment and federal power under the Commerce Clause. The California Alcoholic Beverage Control Act's mandatory minimum retail price maintenance system for liquor sold at retail in California does *not* sanction horizontal price-fixing compiracies, combinations, monopolies, unfair trade practices, unfair competition, or any other violation of federal law.

As cogently noted by this Honorable Court[15] in *Seagram & Sons v. Hostetter,* 384 U.S. 35 at 45 (1966):

> "The appellants' contention that § 9 violates the command of the Supremacy Clause needs no extended discussion. The argument is based upon a claimed inconsistency between § 9 and the federal antitrust laws, specifically the Sherman Act, 26 Stat. 209, as amended, 15 U.S.C. §§ 1-7 (1964 ed.), and §2 of the Clayton Act, 38 Stat. 730, as amended by the Robinson-Patman Act, 49 Stat. 1526, 15 U.S.C. § 13 (1964 ed.).
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> *"In this as in other areas of coincident federal and state regulation, the 'teaching of this court's decisions . . . enjoin[s] seeking out conflicts between state and federal regulation where none clearly exists.'* (Citation)" . . . (Emphasis added.)

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[15]Nor should it be overlooked that this Honorable Court has consistently upheld state sanctioned minimum resale price maintenance programs even as to ordinary commodities. (*Hudson Distributors, Inc. v. Eli Lilly Co.*, 377 U.S. 306 (1964); *Pep Boys v. Pyroil Sales Co.*, 299 U.S. 198 (1936); *Schwegmann Bros. Giant Super Markets v. Hoffman-LaRoche, Inc.*, 221 F.2d 326 (1955), cert. denied 350 U.S. 839; *Schwegmann Bros. Giant Super Markets v. Eli Lilly & Co.*, 205 F.2d 788 (1953), cert. denied 346 U.S. 856.)

In making his factual assertions and legal contentions concerning an alleged lack of, or non-requirement or, fair and open competition in the sale of liquor in California under California's mandatory minimum retail price control provisions, appellant simply fails to perceive and recognize that under California's past and present minimum resale price control provisions for liquor there is no conflict with the federal anti-trust and unfair practice laws presented.

The past and present policy of California with respect to the retail sale of liquor under the mandatory minimum retail price control provisions—as said policy is expressed in sections 23001 and 24749 of the California Alcoholic Beverage Control Act—does not sanction or permit, nor do the provisions themselves sanction or permit, in any way, horizontal price-fixing conspiracies or restraints of trade, anti-trust violations, or vertical unfair trade practices. Hence, the federal government, as well as the State, may take action against any such violations, and correct any such abuses.[16]

In actual practice, the federal anti-trust and restraint of trade laws together with California's corresponding companion law foster and support the orderly functioning of the California Alcoholic Beverage Control Act's mandatory minimum retail price maintenance system for liquor.[17]

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[16]*Burke v. Ford,* 389 U.S. 320 (1967); *Melrose Distillers, Inc. v. United States,* 258 F.2d 726 (4th Cir. 1958), affirmed 358 U.S. 878; *United States v. Maryland State Licensed Bev. Association,* 169 F. Supp. 431 (1959); *United States v. Maryland State Licensed Beverage Association,* 138 F.Supp. 685 (1956); *United States v. McKesson & Robbins,* 351 U.S. 305 (1955); California Bus. & Prof. Code, §§ 16700 et seq., 17000 et seq., 25503 & 25505; 15 U.S.C.A. § 1 et seq.

[17]The California Court of Appeal in *DeMartini v. Department of Alcoholic Beverage Control,* 215 Cal.App.2d 787, 809-

It is only against uncontrolled price wars, cut-rate sales and ruinous competition in the retail sale of liquor within its borders that California has resolutely set its statutory face.

Conclusion

It is respectfully submitted that the appeal should be dismissed for want of a substantial federal question.

THOMAS C. LYNCH,
Attorney General of the State of California,

LYNN HENRY JOHNSON,
Deputy Attorney General of the State of California,

By LYNN HENRY JOHNSON,
Attorneys for Respondent.

(APPENDICES FOLLOW)

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811 (1963) 30 Cal.Rptr. 668, 680-681, hearing by California Supreme Court denied, held that it was a matter of common knowledge in California (to the extent that California courts could take judicial notice thereof) that there are countless retail outlets in California merchandising countless brands of distilled spirits, which countless brands vie with each other for public favor.

APPENDIX A.

CHAPTER 10. ALCOHOLIC BEVERAGES FAIR TRADE CONTRACTS AND PRICE POSTING

§ 24749. Policy.

§ 24750. Contracts lawful.

§ 24750.5 Wine fair trade contracts.

§ 24751. Closeouts.

§ 24752. Selling below fair trade price.

§ 24753. Contrasts between producers.

§ 24754. Containers.

§ 24755. Price schedule; "Loss leader."

§ 24755.1. Penalties.

§ 24756. Distilled spirits price posting.

§ 24757. Rules.

24759. Policy. It is the declared policy of the State that it is necessary to regulate and control the manufacture, sale, and distribution of alcoholic beverages within this State for the purpose of fostering and promoting temperance in their consumption and respect for and obedience to the law. In order to eliminate price wars which unduly stimulate the sale and consumption of alcoholic beverages and disrupt the orderly sale and distribution thereof, it is hereby declared as the policy of this State that the sale of alcoholic beverages should be subjected to certain restrictions and regulations. The necessity for the enactment of provisions of this chapter is, therefore, declared as a matter of legislative determination.

24750. Contracts lawful. No contract relating to the sale or resale of any alcoholic beverage which bears,

or the label or container of which bears, the trademark, brand, or name of the producer or owner of the alcoholic beverage and which is in fair and open competition with alcoholic beverages of the same general class produced by others violates any law of this State by reason of either of the following provisions which may be contained in such contract:

(a) That the buyer will not resell the alcoholic beverage except at the price stipulated by the vendor.

(b) That the producer or vendee of the alcoholic beverage require, upon the sale of the alcoholic beverage to another, that the purchaser agree that he will not, in turn, resell except at the price stipulated by the producer or vendee.

24750.5. Wine fair trade contracts. Fair trade contracts for wine have been and shall continue to be authorized by this chapter. Such contracts shall be governed by the applicable provisions of this chapter and Chapter 11 (commencing with Section 24850).

24751. Closeouts. The provisions authorized by Section 24750 in any contract imply conditions that the alcoholic beverage may be resold without reference to the agreement in the following cases:

(a) In closing out the owner's stock for the purpose of discontinuing delivery of any such alcoholic beverage. At the place of any such sale and upon the goods sold and in any advertisement in connection therewith public notice shall be given of the character of the sale as a closeout sale. The alcoholic beverage shall first be offered to the manufacturer or vendor thereof at the original invoice price at least 10 days before it is offered for sale to the public.

(b) When the alcoholic beverage or container is damaged or deteriorated in quality, and notice of this fact is given to the public at the place of any such sale and upon the goods sold and in any advertisement in connection therewith.

(c) By any officer acting under the orders of any court.

24752. Selling below fair trade price. Willfully and knowingly advertising, offering for sale, or selling any alcoholic beverage at less than the price stipulated in any contract entered into pursuant to this chapter or in any effective minimum retail price scheduled filed with the department pursuant to Section 24755, whether the person so advertising, offering for sale, or selling is or is not a party to the contract, is unfair competition and is actionable at the suit of any person damaged thereby.

24753. Contracts between producers. This chapter does not apply to any contract or agreement between producers or between wholesalers or between retailers as to sale or resale prices.

24754. Containers. The provisions of this chapter apply to the containers, cartons, cases, or bottles for alcoholic beverages.

24755. Minimum retail price schedule; filing; amendments; loss leader sales; rejection of noncomplying schedules; exempt sales. (a) No package of distilled spirits which bears the brand, trademark or name of the owner or person in control shall be sold at retail in this State for consumption off the license premises unless a minimum retail price for such package first shall have been filed with the department in accordance with the provisions of this section.

(b) A price for each of such packages shall be in a minimum retail price schedule setting forth with respect to each package the exact brand, trademark or name, capacity, and type of package, type of distilled spirits, age and proof, where stated on the label, and the minimum selling price at retail. The price for any such package may be filed separately and differently for the trading area of Southern California and the trading area of Northern California. The trading area of Southern California shall consist of the Counties of Santa Barbara, Ventura, Los Angeles, Orange, Riverside, San Bernardino, Imperial and San Diego. The Northern California trading area shall consist of the other counties of the State. No more than one person shall file a schedule for the same package for the same trading area. Any person filing such schedule shall cause such schedule to be published in a manner which will result in each retailer affected by such schedule being advised of the contents of such schedule prior to the effective date thereof.

(c) Such schedule shall be filed by (1) the owner of the brand, if licensed in the State; (2) any licensee, other than a retailer, selling the brand and who is authorized in writing by the brand owner to file such schedule if the brand owner is not licensed in this State; (3) a manufacturer or rectifier licensed in this State and who bottles under the brand owned by a retailer; or (4) any licensee with the approval of the department, if the owner of the brand does not file or is unable to file a schedule or authorize a licensee other than a retailer to file such schedule.

(d) Schedules filed pursuant to this section may be amended, changed, or modified by filing such amend-

ments, change, or modification with the department on or before the 15th day of any month to take effect on the first day of the second succeeding calendar month; except that prices filed for a brand, size, or type not included in a schedule in effect at the time such brand, size, or type is filed, and prices filed to meet the price of a competitive brand, may be filed on or before the 15th day of any month to take effect on the first day of the following month. For the purpose of this section, a competitive brand shall mean any brand of the same type of distilled spirits having a filed selling price at retail within one dollar ($1) per gallon of the brand for which a competitive price is filed.

No retailer shall sell any package of distilled spirits as a loss leader. "Loss Leader," as used in this section, means a sale below cost as such cost is defined in Sections 17026 to 17029, inclusive, of this code, except that a sale below cost made under the provisions of Section 17050 of this code shall not be deemed a loss leader sale.

The department shall reject any price schedule which does not comply with this subdivision.

(e) No offsale licensee shall sell any package of distilled spirits at any price less than the effective filed price of such package unless written permission is granted by the department, for good cause shown and for reasons not inconsistent with this division.

(f) The provisions of this section shall not apply to:

(1) A closeout sale made in good faith and approved by the department when the following conditions exist: (i) the stock of distilled spirits sought to be closed out has been in this State, either in the possession of the vendor who sold it to the retailer or in

the possession of the retailer who seeks to close out the brand, for a period of not less than six months; (ii) the stock of distilled spirits to be closed out was not brought into this State for the purpose of offering it, or any part of it, at a closeout sale; (iii) at least 10 days prior to filing a request with the department for approval to sell the stock at a closeout sale, the retailer had offered to return the distilled spirits, at his original invoice cost, to both the vendors from whom he purchased them or to his successor and to the licensee who filed the minimum price schedule under the provisions of this section; (iv) such offer of return was not accepted.

At the place of any closeout sale and upon any package of distilled spirits to be so sold and in any advertisement in connection therewith, public notice shall be given of the sale as a closeout sale. Following the conclusion of a closeout sale, the retailer who conducted such sale shall not sell the same brands of distilled spirits for a period of at least one year.

(2) Sales made with the approval of the department when the distilled spirts or the package is damaged or deteriorated in quality and notice of this fact is given to the public at the place of any such sale and upon the package offered for sale and in any advertisement in connection therewith.

(3) Sales made by any officer acting under the orders of any court.

(g) A minimum retail price schedule containing a minimum retail price for each package of any brand of beer may be filed under the provisions of this chapter by the person in control of such brand and when so

filed, the provisions of this chapter and any rules adopted by the department for the administration of the provisions of this chapter shall apply to the sale of packages of such brand of beer. (Added Stats. 1961, c. 635, p. 1835, § 4.)

24755.1 Penalties. No criminal penalties shall be imposed on any licensee for a violation of the provisions of Section 24755 nor shall the license of a licensee by suspended or revoked for a violation of such section.

The penalties imposed by the department for violations of such section shall be confined solely to monetary penalties for each violation committed during 36 consecutive months and shall be in the following amounts:

For the first violation, two hundred fifty dollars ($250); for the second and subsequent violations, one thousand dollars ($1,000). The penalties herein provided shall be due and payable by the licensee to the General Fund not later than 30 days from the date the department rendered its decision imposing the penalty. Should the licensee appeal the decision of the department, he shall either pay the amount of the penalty under protest or execute a surety bond in the amount of the penalty. The surety bond shall be executed by the licensee as principal and a corporation such as is mentioned in Section 1056 of the Code of Civil Procedure in this state as surety, payable to the General Fund at such time as the final decision is rendered affirming the department's decision. If the final decision should reverse the decision of the department, the penalty paid by the licensee under protest shall be returned to him with interest at the rate of 6 per cent per annum or the surety bond executed by the licensee terminated.

The license of a licensee against whom the departent has imposed the monetary penalty and who has refused to pay the penalty for each violation under protest or execute a surety bond as herein provided shall be automatically suspended and shall remain suspended until such time as the licensee either pays the penalty under protest or executes the surety bond as herein provided.

Each sale in violation of section 24755 shall constitute a separate violation.

24756. *Distilled spirits price posting.* Every distilled spirits manufacturer, brandy manufacturer, rectifier, and wholesaler shall file and maintain with the department a price list showing the prices at which distilled spirits are sold to retailers by the licensee. Sales of distilled spirits to retailers by each distilled spirits manufacturer, brandy manufacturer, rectifier, and wholesaler shall be made in compliance with the price list of the licensee on file with the department.

24757. *Rule.* The department may adopt such rules as it determines to be necessary for the administration of Sections 24754 to 24756, inclusive, and shall take such steps as may be necessary to enforce the provisons of such sections and the rules adopted by it for the administration thereof.

APPENDIX B.

99. Minimum Retail Price Schedules. (a) Posting of Minimum Retail Price Required. No off-sale licensee shall sell any package of distilled spirits at a price less than the effective minimum retail price of such package filed with the department, unless written permission is granted by the department for good cause shown and for reasons not inconsistent with the law.

The licensed owner or person in control of a brand, trade mark or name appearing on a package of distilled spirits which is to be sold for consumption off the licensed premises in California must file a "Distilled Spirits Minimum Retail Price Schedule" containing the minimum bottle and case prices to consumers for every distilled spirits item carrying that brand, trade mark or name.

(b) Brand Defined. The word 'brand" as used herein means "brand, trade mark, label or name", and if an additional secondary name or a different form of label is used, each will be considered to be a separate brand.

(c) Distilled Spirits Item Defined. "Distilled spirits item" as used herein means a distilled spirits package that differs from all other distilled spirits in addition to its brand, as defined in (b) above, in any one of the following categories: (1) Type of distilled spirits including type of bottling (in bond or not in bond), and type of blend (blend of straight whiskeys or spirits blend); (2) Percentage of Straight Whiskey; (3) Age, if shown on the label; (4) Proof; (5) Origin (domestic or imported); (6) Bottle size; and (7) Number of bottles in a case.

When a container other than the normal container for a brand is used as in the case of a decanter, higher minimum retail prices must be established to reflect any additional cost involved.

(d) Distilled Spirits Sold "On-Sale" Only. If a particular item is labeled to indicate that it is intended for sale to and for dispensing by on-sale retailers only (such as "bar package", "for on-sale only"), the minimum retail price thereof need not be filed. However, if any sale for off-sale consumption of such item should be made, the licensee making such sale will have violated the law.

(e) Who Files Minimum Retail Price Schedules. Only one licensee is permitted to file a "minimum retail price schedule" containing the price for the same item for the same trading area. However, different prices may be filed in the Northern and Southern trading areas.

This means that (1) the owner of the brand or the corporate subsidiary who exclusively markets the products thereof and so is the controller of the brand, if licensed in California, if other than a retailer, must file; or (2) if the owner of the brand is not licensed in California and has no corporate subsidiary marketing in California, any licensee, other than a retailer, authorized by him in writing must file, such as a wholesale or importer authorized by an out-of-State or out-of-country brand owner; or (3) if the brand is owned by a retailer, the California-licensed manufacturer or rectifier who bottles an item of distilled spirits under that brand must file for the item; or (4) if none of the three situations above apply and the brand is owned by

a retailer, the importing wholesaler must file. If none of the three situations above apply and the brand is not owned by a retailer, then any licensee, other than a retailer, who secures the approval of the department must file.

(f) Price Schedule Sheets to be filed. Four copies of a "Distilled Spirits Minimum Retail Price Schedule" on a form prescribed by the department must be filed with the department, 1215 O Street, P.O. Box 1139, Sacramento 5, and one copy retained by the licensee in his office for inspection. The "Minimum Retail Price Schedule" may be printed, typewritten or otherwise duplicated on 16 or 20 pound paper on a format and size prescribed by the department and must show the form number "ABC 705" in the lower lefthand corner of the face of the sheet. All information called for on the form sheet must be supplied. A separate set of "Price Schedules" must be made originally, or if added later as a new item, for every different type of distilled spirits, and if that type has different categories as defined in (2), (3), (4) and (5) in the definition of "Distilled Spirits Item" in (c) above, a separate set must be made for each such difference. Each schedule must contain every bottle size (6) and every size of case (7) in which that brand, type, etc., will be sold. When a new bottle size or new size case is to be sold, or the price of any size of bottle or size of case already on file is to be changed either independently or to meet the price of a competitive brand, new sets of price schedules, in quadruplicate, must be filed to replace those on file and must also include all the information that was on the superseded schedule. Both minimum retail bottle price and minumum retail case prices covering all

case sizes must be shown on the price schedules for each size and type.

(g) Filing Dates; New Item. A set of original schedules for new items must be filed on or before the close of business of the fifteenth day of any calendar month to take effect on the first day of the following month, provided, however, the price of such new item is published on or before the aforesaid effective date.

(h) Change of Minimum Retail Price on File. A set of replacement schedules must be filed on or before the close of business of the fifteenth day of any calendar month, to be effective on the first day of the second succeeding month; provided, however, the changed price is published on or before the aforesaid effective date.

(i) Change in Price of an Item to Meet Price of Competitive Brand. A set of replacement schedules for competitive items must be filed on or before the close of business of the fifteenth day of any calendar month, to be effective on the first day of the following month; provided, however, such price change is published on or before the aforesaid effective date.

A competitive brand is a brand of the same type of distilled spirits as the brand for which a change in price is being filed and for which at the time of filing there is on file a "Price Schedule" sheet filed by some other licensee showing a minimum retail price for the competitive brand item within one dollar per gallon of the price being cha ged, and proportionately for smaller sizes. The same ype of distilled spirits means one identical as to categories (1) and (5) in the definition of "Distilled Spirits Item" in (c) above; the price

change involved must apply to the identical item indicated in categories (6) and (7).

If a price is filed to meet the price of a competitive brand, the price so filed shall be the same as the price which is being met.

(j) Filing Date Exception. Whenever the fifteenth day of any month falls on Saturday, Sunday or a legal holiday, the price schedules required to be filed may be filed not later than the close of business the next business day.

(k) Publication. The person filing minimum retail price schedules shall cause prices for all items on every original price schedule and of every change of price or new price on every replacement price schedule to be published in a trade journal of general circulation in the trading areas affected on or before the effective date thereof. Publication of minimum retail prices for a brand sold only to a single retailer may be accomplished by the mailing of such price schedules by the importer, manufacturer, manufacturer's agent, rectifier or wholesaler, and any amendments thereto, to the retail licensee affected thereby. The schedule shall be deposited in the United States Post Office on or before the date or dates required for publication of price schedules as prescribed above in this paragraph, and the mailing shall be complete at the time of such deposit. A record of each such notification should be retained in the file of the posting licensee for three years.

(l) Deliveries. No manufacturer, wholesaler or rectifier shall make deliveries of any particular item of distilled spirits to any off-sale retail licensee before a "Price Schedule" with that item thereon has been filed

with the department; thereafter he may make deliveries thereof within such time before the price becomes effective as would give the retailer reasonable time to get the item ready for sale upon the price becoming effective.

(m) Withdrawal of Item from Price Schedule. No item may be deleted from a replacement "Price Schedule" once it has been filed on an original schedule until the department authorizes such deletion when the department makes a finding that the item is carried in wholesale and off-sale retail inventories in only very small quantities.

(n) Transfer of Price Filing Obligation. When for any reason, price filing responsibility for any item is transferred from one licensee to another, the price schedules of the licensee then on file will continue in effect until replaced by an effective new filing by the successor which will be considered to be a schedule already on file.

(o) Tax Increase or Government Order. Pursuant to an order issued by the department, any price schedule may be changed at any time to reflect changes in federal or state excise taxes on distilled spirits or to comply with the requirements of any order issued by the federal government and relating to price control.

(p) Sales as Loss Leaders Prohibited. All distilled spirits minimum retail prices filed under the provisions of Section 24755 shall comply with all the provisions of said section including the provisions of subsection (d) which prohibits the sale of distilled spirits as a loss leader. Any licensee filing distilled spirits minimum retail prices below the purchasing retailer's cost of

acquisition plus said retailer's cost of doing business as referred to in said subsection shall produce evidence to show that such price was filed to meet the legal price of a competitor selling the same article or product.

NOTE: Authority cited for amendment filed 10-2-56: Sections 24757 and 25750, Business and Professions Code; Section 22, Article XX, California Constitution, Issuing agency; Department of Alcoholic Beverage Control. Additional authority cited: Sections 24749, 24750, 24751, 24752, 24755 and 25752; Business and Professions Code.

History: 1. Repealer and new section filed 9-12-61; designated effective 10-15-61 (Register 61, No. 18). For prior history, see Register 60, No. 16.

APPENDIX C.

Opinion of the Court of Appeal.

In the Court of Appeal of the State of California Second Appellate District, Division Two.

James O. Reimel, Director of the Department of Alcoholic Beverage Control of the State of California, Petitioner and Appellant, vs. Leverette D. House, Leon M. Cooper, Roger P. Garety, as Chairman and Members of the Alcoholic Beverage Control Appeals Board, Defendants and Respondents. 2nd Civil No. 31240.

Filed May 10, 1968.

APPEAL from a judgment of the Superior Court of Los Angeles County. Ralph H. Nutter, Judge. Reversed, with directions.

Thomas C. Lynch, Attorney General, and Lynn Henry Johnson, Deputy Attorney General, for Appellant.

Leslie & Rubin and Lawrence Teplin for Real Party in Interest, Pennwick Corporation.

Leo K. Gallant, Senior Counsel, Alcoholic Beverage Control Appeals Board, for Respondent Alcoholic Beverage Control Appeals Board.

The instant appeal arises in the same manner and involves the identical issues recently decided in *Reimel v. Alcoholic Bev. etc. Appeals Bd.*, 256 A.C.A. 188 (hearing denied January 17, 1968).

Here, as in the case above cited, the trial court denied the petition for writ of mandate sought by the appellant, Department of Alcoholic Beverage Control, and thereby upheld the action of the respondent, Alcoholic Beverage Control Appeals Board, in reversing the de-

cision of the Department wherein a penalty had been imposed upon respondent and real party in interest, Pennwick Corporation, for selling certain alcoholic beverages at prices less than the established fair trade price in violation of Business and Professions Code, section 24755, and Title 4, California Administrative Code, section 99(a). The trial court spelled out the basis for its decision in the following conclusion of law:

"The decision of respondent [Alcoholic Beverage Control Appeals Board] that the record must contain substantial evidence of publication of the price schedules in compliance with the provisions of section 24755 of the Business and Professions Code constitutes a correct interpretation of that code section. Publication of the price schedules in a trade journal circulated among some but not all licensees in the trading area is not such compliance, and the department's rule 99(k) (title 4, California Administrative Code, section 99, subparagraph (k)) is invalid and in conflict with the publication provisions of Business and Professions Code section 24755, subparagraph (b)." Subparagraph (b) of section 24755, insofar as here pertinent, reads as follows:

"Any person filing such [minimum retail price] schedule shall cause such schedule to be published in a manner which will result in each retailer affected by such schedule being advised of the contents of such schedule prior to the effective date thereof." The Department's rule 99(k) interpreting the above quoted language provides:

"(k) Publication. The person filing minimum retail price schedules shall cause prices for all items on every original price schedule and for every change of price or

new price on every replacement price schedule to be published in a trade journal of general circulation in the trading areas affected on or before the effective date thereof."

The minimum prices for the alcoholic beverages in issue in the instant proceeding had been published in the August 1964 edition of Patterson's Gazetter. Patterson's Gazetteer is a trade publication directed to the alcoholic beverage industry. It is published monthly and includes the prices of alcoholic beverages at wholesale and retail. It is published in the eight counties that compose the "trading area of Southern California" (Bus. & Prof. Code, § 24755(b)), and there are no similar publications published in these counties. Its subscribers are liquor licensees, wholesalers and brand owners and it has a circulation of approximately 10,500 subscribers. Although not necessary to the narrow question here presented, appellant introduced evidence that Pennwick was mailed the issues of Patterson's Gazetteer for June, July, August and September, 1964.

As previously indicated, the court in *Reimel v. Alcoholic Bev. etc. Appeals Bd., supra,* 256 A.C.A. 188, 195-201, rejected the contention of the respondent Appeals Board that section 24755(b) required that publication occur in such a manner that each retailer *will necessarily* be advised of the contents of the applicable minimum price schedule. It held that the Department had correctly interpreted section 24755(b) in its rule 99(k) and that the publication required need only be in a manner *most likely* to give notice to the affected licensees. A trade journal in general circulation in the trading area was held to be a proper vehicle for such publication. We concur in this determination. The

most recent decision in *Reimel v. House,* 259 A.C.A. 532, is in accord.

Although not the basis of the decision here under review, respondent Pennwick urges that section 24755 is unconstitutional and that section 24755.1 relating to penalties and added by the Legislature in 1965 is retroactive in application. Each of these contentions was expressly rejected in *Wilke & Holzheiser, Inc. v. Dept. of Alcoholic Bev. Control,* 65 Cal.2d 349, 355 et seq. and 369 et seq., and in *Reimel v. Alcoholic Bev. etc. Appeals Bd., supra,* 256 A.C.A. 188, 201-204 and 205-206.

Respondent Pennwick in its brief has urged several additional points which were not raised before the Department, the Appeals Board or the superior court. "[T]hese points relate to questions of fact or mixed questions of fact and law which could have been presented to and considered by the Department. Under well-established rules such matters may not be urged for the first time on appeal. [Citations.]" (*Reimel, supra,* p. 205.)

The judgment is reversed. The superior court is directed to grant a writ of mandate commanding the respondent Appeals Board to set aside its decision reversing the decision of the Department and to affirm such decision of the Department.

Herndon, *J.*

We concur:

Roth, *P. J.*

Fleming, *J.*

THE COURT: This opinion is not for publication pursuant to the provisions of Rule 976, California Rules of Court.

SUPREME COURT OF THE UNITED STATES

October Term, 1968.

PENNWICK CORP. *v.* KIRBY.

APPEAL FROM THE COURT OF APPEAL OF CALIFORNIA, SECOND APPELLATE DISTRICT.

No. 325. Decided October 14, 1968.

PER CURIAM.

The motion to dismiss is granted and the appeal is dismissed for want of a substantial federal question.